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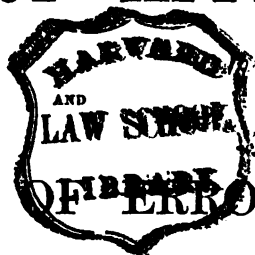
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REPORTS OF CASES AT LAW,

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS



COURT OF ERRORS,

OF

SOUTH CAROLINA.

VOLUME X.

FROM NOVEMBER, 1856; TO MAY, 1857; BOTH INCLUSIVE.

BY J. S. G. RICHARDSON,

STATE REPORTER.

CHARLESTON, S. C.
MCCARTER & Co.
1857.

1845
1846
1847
v. 10
= 445.0

Rec Nov 9, 1857.

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

Judges of the Court of Sessions and Common Pleas,

AND OF THE

Jury Court of Appeals:

HON. JOHN B. O'NEALL,
" DAVID L. WARDLAW,
" THOMAS J. WITHERS,

HON. JOSEPH N. WHITNER,
" THOMAS W. GLOVER,
" ROBERT MUNRO.

Chancellors and Judges of the Court of Appeals in Equity:

HON. JOB JOHNSTON,
" BENJAMIN F. DUNKIN,

HON. GEORGE W. DARGAN,
" F. H. WARDLAW.

Recorder of the City of Charleston:

HON. WILLIAM RICE.

Assistant Recorder of the City of Charleston:

HON. CHARLES MCBETH.

Attorney General:

I. W. HAYNE, Esq.

Solicitors:

Eastern Circuit, H. McIVER, Esq.

Western " J. P. REED, Esq.

Middle " SIMEON FAIR, Esq.

Northern " C. D. MELTON, Esq.

Southern " M. L. BONHAM, Esq.

ERRATA.

Page 52, line 10, for "was a case," read "was case."

" 77, " 28, for "precedents," read "precedent."

" 92, " 9, for "was a case," read "was case."

" 290, " 28, for "applicable ase," read "applicable to this case."

" 417, " 21, for "in ascribes," read "and ascribes."

" 427, " 30, for "that," read "what."

" 428, " 11, for "WITHERS," read "WHITNER."

" 482, " 28, for "defendant's," read "defendants'."

" 504, " 10, for "exercises," read "exercise."

" 531, " 18, for "doubted," read "doubtful."

The above are all the errors of the press, of any consequence, that have been detected. In correcting the many errors (real or supposed,) of the copy, some will always escape observation. The following corrections, it is suggested, should be made.

At page 463, line 24, for "principal," read "bail," so that that part of the sentence will read thus, "when the bail may be left," &c.

At page 469, line 8, for "defendant," read "plaintiff."

The only correction, (if it is one,) which it is deemed proper to mention here, was made in the important case of *Noble vs. Burnett*, at page 520, line 12, the word "not," between the words "did," and "disqualify," was stricken out.

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CASES AT LAW,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA,

Columbia—November and December Term, 1856.

JUSTICES PRESENT.

HON. JOHN B. O'NEALL,
" DAVID L. WARDLAW,
" THOMAS J. WITHERS,

HON. JOSEPH N. WHITNER,
" THOMAS W. GLOVER,
" ROBERT MUNRO.

BRANDON & NETHERS *vs.* HENRY ROGERS.

Upon a suggestion under the Insolvent Debtors' Act, the jury found, that the applicant, with the intention of securing a benefit to himself by retaining possession of his estate, had fraudulently, and without consideration, assigned his whole personal estate, and had since remained in possession and used and enjoyed the assigned effects as his own:—*Held*, in an action on the prison bounds' bond, that such verdict was substantially a finding that the schedule (which did not include the assigned effects) was false.

In an action upon a prison bounds' bond, the costs of a suggestion, upon which the application for a discharge had been successfully resisted, cannot be recovered.

BEFORE WHITNER, J., AT UNION, SEPTEMBER, EXTRA TERM, 1856.

Debt on prison bounds' bond against the surety. Breach
VOL. X.—2

Brandon & Nethers vs. Rogers.

assigned—That Charles Gowing, the principal, “did not render to the Clerk of the District a schedule of his whole estate.”

Gowing had been arrested under *ca. sa.*, at the suit of the plaintiffs, and gave the usual prison bounds' bond. He made application for the benefit of the Insolvent Debtors' Act, and his discharge was resisted. The suggestion contained, *inter alia*, the following specifications.

1st. Because the defendant, Charles Gowing, has fraudulently assigned and conveyed the whole of his personal estate to his son, Rodney Gowing, without good or valid consideration, and with a fraudulent understanding and intention of securing to himself a benefit out of his estate, at the expense and to the injury of his creditors, by retaining possession of his estate so assigned.

2d. Because the debts and judgments preferred by the defendant to his son, Rodney Gowing, are fraudulent and false in fact and in law, and are set up under a corrupt and fraudulent understanding and combination between the father and son, to secure to the father a benefit, and to hinder and defeat the plaintiffs and others, the creditors of the said defendant, in the collection of their just claims.

6th. Because, since the assignment by the defendant to his son Rodney Gowing, he has remained in possession, and used and enjoyed as his own, the assigned effects, contrary to law, and with the fraudulent intention of hindering the plaintiffs and others of his creditors in the collection of their debts.

Upon these specifications he was found guilty; and this finding was relied upon as evidence that the schedule was false.

A motion for a non-suit, on the ground that there was no

Columbia, November and December, 1856.

proof of the breach of the condition of the bond, was overruled; and under the instructions of his Honor, the jury found for the plaintiffs, and included in the verdict the amount of the costs of the suggestion.

The defendant appealed, and now renewed his motion for a non-suit, on the ground taken in the Court below; and, failing in that motion, moved for a new trial, on the ground, *inter alia*,

2. Because the defendant was not liable for the costs of the suggestion.

Herndon, for appellant.

Dawkins, contra.

The opinion of the Court was delivered by

WITHERS, J. In this case, which is an action against the defendant on a prison bounds' bond, the leading question is, whether Charles Gowing, (the principal in the bond, and an applicant for the benefit of the Insolvent Debtors' Law,) has been convicted of default, in not rendering "to the Clerk of the District, a schedule of his whole estate."

Upon a trial had upon suggestion by the creditors contesting the right of Charles Gowing to be discharged, the jury found, *inter alia*, as follows: that "Charles Gowing has fraudulently assigned and conveyed the whole of his personal estate to his son Rodney Gowing, without good or valid consideration, and with a fraudulent understanding and intention of securing to himself a benefit out of his estate, at the expense and to the injury of his creditors, by retaining possession of his estate so assigned:" that "since the assignment by the defendant (Charles Gowing), to his son Rodney Gowing, he has remained in possession, and used and enjoyed as his own, the assigned effects, contrary to law, and with the frau-

Brandon & Nethers vs. Rogers.

dule intention of hindering the plaintiffs and others of his creditors in the collection of their debts."

The verdict does not, in express terms, find that the schedule was false and fraudulent, nor does it use the words that Charles Gowing had not included "his whole estate," in his schedule. But that is certain which can be rendered so by what appears, and necessarily imports the certainty. It is found, by the verdict of the jury, that Gowing was in possession of an estate which was his own, and ought to have been rendered to the creditors, and was not. He had attempted to cover it by fraudulent transfer to his son, but retained the "possession" and "used and enjoyed it as his own." We do not know what were the contents of the schedule, since no copy appears in this case, nor is any found in that of *Charles Gowing* ads. *Brandon & Nethers*, reported in 7 Rich. 459. But it was the duty of Gowing to include the effects, referred to in the verdict on the suggestion, in his schedule, and to assign them to the assignee, whatever liens might exist. Much more was this necessary to an account of his "whole estate," to a "just and fair account of his estate," to an account which should not be "a false return," "a false schedule," (all which phrases are used, touching the schedule required by the Act of 1788,) when, as the verdict finds, he was in possession of such effects, just as he had theretofore been, free from any honest or legal claim on the part of any other person. The verdict wiped out the transaction between Charles and Rodney Gowing, and the former having possession of the effects, was in the same situation, as respects his schedule, as if that transaction had never existed. It was as false, as incomplete, as fraudulent an account of his whole estate, as though the contrivance with his son had never existed. It was not a case in which he had "fraudulently sold, conveyed, or assigned his estate to defraud his creditors," irrespective of time, and had parted with the possession and control and use of the same, and, therefore, we need say nothing as to that

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transaction touching a breach of the prison bounds' bond, as here assigned against a surety. If Gowing had put his effects into the keeping of a friend, who was to hold for him and his use, and omitted them from his schedule under a mere pretext that his friend was legal owner, who can doubt, that such a schedule would not contain an account of his whole estate, would not be just and fair, would be a false schedule? The oath to be administered, as it respects the debtor's *schedule*, requires him to swear, that "it doth contain a full and true account of all my real and personal estate, debts, credits, and effects whatsoever, without exception, which I, or any person in trust for me, have," &c. We think that Charles Gowing was convicted of an act which is quite tantamount to that assigned as a breach in this action, and that, therefore, the plaintiff was entitled to recover a verdict. It is, however, not questioned, that the debtor may fail to procure his discharge for sundry causes that would not visit liability upon the sureties to his prison bounds' bond. In the cases of *Arrants v. Dunlap*, and *Cavan v. The Same*, (Cheves, 28, 243,) there was no proceeding against a surety. In that litigation, it was adjudged, (Butler, J., strongly dissenting,) that a previous assignment of property embraced in the schedule, and therein stated to have been assigned, which *assignment* was found to be "false and fraudulent," was enough to retain the debtor a prisoner in the case upon which he had been arrested, but that this verdict was not equivalent to one finding a false *schedule* where other creditors subsequently opposed the 10th Sec. of the Prison Bounds' Act, to show, that the prior verdict disabled the same applicant to claim the benefit of the insolvent laws. There the debtor did include, literally, in his schedule, his whole estate, but sought to recognize and impose an unfounded and fraudulent lien on it. It is manifest that there is a great difference between putting an assignee in possession, or giving him the means of possession, of effects, though recognizing a pretensive lien on them, and omitting

Brandon & Nethers vs. Rogers.

them altogether in the account, withholding possession and any means of gaining it, and interposing for that purpose a pretensive and fraudulent transfer by instrument of writing only.

The first ground for new trial is not pressed here, but the second is, and is well founded. The case of *Baker, Johnson & Co. v. Bushnell*, 2 M'Mul. 21, is a full authority to establish that the costs of the trial, upon the suggestion against Charles Gowing, are not chargeable in this action against his surety. These costs amount to fifty-two dollars and fifty-nine cents, which sum has been included in the verdict. There must then be a new trial in this case, unless the plaintiffs, or their attorney, shall remit, in writing upon the record and the execution, the sum of fifty-two dollars and fifty-nine cents, on or before the first Monday in March next; and, it is ordered further, that due notice of this order be forwarded to the Clerk of the Court of Union District, who shall cause the same to be served, in due time, upon the plaintiffs, or their attorney, by the sheriff of said district, and the service thereof to be returned proved, to his office.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion granted nisi.

Columbia, November and December, 1856.

WILLIAM SLOAN vs. ANSON BANGS & Co.

Domestic attachment against four partners issued on plaintiff's oath, that he had just grounds to 'suppose and does very believe that defendants intend to remove their effects.' Three of the defendants, it clearly appeared, were out of the State. J. M., another defendant, left the State and went to Georgia, a few days before the attachment issued, declaring his intention to return, and leaving his baggage at the hotel where he boarded. On the day the attachment issued, he was in Georgia, and the defendants were then in the act of removing their goods. Motion to set aside the attachment, because the defendants were out of the State, refused.

BEFORE WHITNER J., AT ANDERSON, FALL TERM, 1856.

This was a domestic attachment against Anson Bangs, Eli Bangs, John C. Mather, Butler H. Bixby and Ausburn Bird-sall, co-partners under the name and firm of Anson Bangs & Company. The recital in the writ was, that plaintiff "has just grounds to suppose and does verily believe, that defendants intend to remove their effects." A motion was made to set aside the attachment, on the ground that all the defendants were absent from and without the limits of this State on 23d April, 1856, when the attachment was issued. The facts, upon which the motion was based, were contained in several affidavits, and sufficiently appear in the opinion delivered in the Court of Appeals. His Honor, the presiding Judge, refused the motion. Defendants appealed, and now renewed their motion in this Court.

Reed, for appellant.

McGowan, contra.

Sloan vs. Bangs & Co.

CURIA PER O'NEALL, J. It appears very clearly, that Anson Bangs, Eli Bangs, Butler H. Bixby, and Ausburn Birdsall, in the months of April and May, were not in the State of South Carolina. John C. Mather, was in Anderson, South Carolina, until a few days before the issuing of the attachment; he left, professing an intention to return in a few days, leaving his baggage in the room of the hotel where he boarded. On the day of the date of the attachment, it also appears, that he was in Athens, Georgia: but at the time of the issuing of the attachment, the goods of the defendants were in the act of removal.

The attachment was issued under the fourth head of the powers of a magistrate, under the Act of 1839, to issue an attachment. *Lindau vs. Arnold*, 4 Strob. 492.

The information on oath to the magistrate, is in the precise words of the Act, and is sustained by the facts above alluded to in reference to John C. Mather, one of the firm of Bangs & Co. It may be, that such a levy is only good as to him, and may not affect the other partners. But, as at present advised, we must sustain the attachment, and leave the parties to pursue such course as they may think proper as to other matters.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, November and December, 1856.

GEORGE W. CARPENTER vs. F. J. OAKS.

R. having agreed with C., to purchase from him, goods on credit, and give him security, drew his promissory note, payable to the order of C., and O. indorsed the same in blank. R. then delivered the note to the agent of C. and received the goods:—*Held*, that O. was liable as maker.

O. refused to indorse the note until he was advised by counsel, that he would not be responsible for R., but that he would be indorser for C. He, however, knew the purpose for which the note was to be used:—*Held*, that this did not affect his liability.

C. indorsed the note in blank, but the indorsement was afterwards stricken out:—*Held*, that this did not prevent his recovery.

Where one, intending to become a party to the original contract, indorses a note payable to another, he is liable as maker.

BEFORE GLOVER, J., AT KERSHAW, FALL TERM, 1856.

The facts of this case are stated in the opinion delivered in the Court of Appeals.

Shannon, for appellant.

Kershaw, contra.

The opinion of the Court was delivered by

GLOVER, J. The plaintiff declared in assumpsit on the following promissory note:

“Camden, Oct. 26, 1854.

“Five months after date I promise to pay to the order of George W. Carpenter, at the Bank of Camden, three hundred and thirty-six dollars and ninety-one cents for value received.”

(Signed) “P. ROBENSON.”

Carpenter vs. Oaks.

The plaintiff had forwarded goods to Mr. Caston, his agent, to be delivered to P. Robenson, upon his executing a note with satisfactory security; and, after some negotiation on the subject, Mr. Caston wrote the above note, at the suggestion of Robenson, who refused to sign one in any other form. Robenson took the note, and afterwards returned it to plaintiff's agent endorsed by F. J. Oaks and A. G. Baskin, and received the goods. G. W. Carpenter, who lives in New York, afterwards endorsed the note in blank, but his name was subsequently stricken out. Oaks had repeatedly refused to become Robenson's surety; but consented to endorse the note under the advice of A. G. Baskin, who informed him, that he would not be responsible for Robenson, but that he was endorser for G. W. Carpenter. Oaks knew that the object of Robenson in procuring the note was to obtain possession of the goods held by plaintiff's agent.

The declaration charged the defendant as maker and endorser, and, under the instruction of the presiding Judge, a verdict was rendered for the plaintiff.

The defendant's motion is for a new trial on the grounds:

1. "That he is not liable as maker of a new note, inasmuch as he disclaimed at the time of execution any liability to Carpenter, and had repeatedly refused to become Robenson's surety.

2. "Because the verdict is contrary to the law and evidence."

The liability of a party who is not the payee of a note, and endorses it in blank at the time it is made, is absolute and direct and not collateral. By his endorsement, he certainly intended to add additional security to the paper, and, if he is not responsible as endorser because it is not negotiable according to the law merchant, he should not escape all

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responsibility. The character in which his liability attaches, may be either as maker or guarantor, depending on the time when the endorsement is made. In *Stoney vs. Beaubien*, (2 McMul. 313,) the Court held, that he who writes his name on the back of a note payable to a third person, not yet due, without express words to show the nature of his contract, is an original promissor; and this decision was, afterwards, approved in *Baker vs. Scott*, (5 Rich. 505.)

If Carpenter had endorsed and transferred the note, the contract of Oaks with the holder, would have been that of second endorser after the payee, and such, probably, was the state of things contemplated by his legal adviser at the time Oaks was induced to sign. But when Carpenter's name was stricken out, Oaks no longer stood in the relation, nor incurred any of the responsibilities of an endorser. In such a case his liability is primary; nor would his character as an original promissor be changed in an action by Carpenter as payee, although his endorsement is not stricken out. (*Baker vs. Scott*.) By his endorsement he became, with Robenson, an original maker, and as he signed at the time of the original negotiation between Carpenter's agent and Robenson, the sale and delivery of the goods was a sufficient consideration to sustain the promise of both. If the promise had been subsequent, perhaps forbearance or some other consideration should have been proved to support his promise.

All the questions made by the grounds of appeal, have been so fully considered and answered in *Stoney vs. Beaubien*, and *Baker vs. Scott*, that it is only necessary to refer to them in support of our judgment dismissing the motion.

Motion dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER and MUNRO, JJ., concurred.

Motion dismissed.

The State vs. Lewis.

THE STATE vs. ANGUS LEWIS.

One who wilfully sets fire to his neighbor's grass or fence, may be indicted under the Act of 1789, § 5, 5 Stat. 125.

BEFORE WARDLAW, J., AT MARION, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows :

"The defendant was indicted for burning the woods, &c.

"The Act of 1789, (5 Stat. 125, § 5,) enacts that "no person shall put fire to or burn any *grass*, brush, or *other combustible matter*, so as thereby the woods, fields, *lands*, or marshes be set on fire; provided that no person shall be prevented from firing woods, fields, lands or marshes within his own bounds, so that he suffer not the fire to get without the bounds of his own land, and injure the woods, *fence*, or grass of his neighbor."

"The evidence showed that the defendant having spite against the prosecutor, about midnight broke the prosecutor's fruit trees, pulled down some panels of his fence, and set fire to small tufts of grass, which were under the rails in another part of the fence, whereby a portion of the fence was burned; but the ground within the field having been ploughed, the grass inside having been chopped out, and the leaves on the outside having been previously raked by the prosecutor from the fence, the fire did not extend beyond the fence.

"For the defendant, it was argued that the title and preamble of the Act show that the burning prohibited, is only such burning as proceeds from *fire-hunting*, or other negligence, unintentional of wrong; and that setting fire to a fence, whereby the fence only, and not the woods, fields or marshes, were burnt, does not fall within the prohibition of the Act.

"I held that the enactments, which are beyond the scope

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of the title and preamble, are not limited by them; that fences fixed upon lands fall within the term *lands*, used in the primary enactment, as appears plainly from the introduction of the word *fence* in the proviso. That by this Act is prohibited every setting of fire, wilful or negligent, (which does not fall within some other Act providing a higher penalty,) where no care to prevent spreading is taken, and the fire is either set upon another's land or spreads to it; and that in this case, whether the fire was set to the grass and spread to the fence, or was set to the fence, itself *combustible matter*, and spread to other parts of the fence, the defendant, if found to have done the act wilfully or negligently, might be convicted.

"Verdict guilty."

The defendant appealed and now moved for a new trial:

Because the evidence did not show that the act of the defendant was an offence within the provisions of the Act of 1789, under which he was indicted, and that the charge of his Honor that it did constitute such an offence was erroneous.

Harlee and *McDuffie*, for appellant. -

McIver, solicitor, contra.

The opinion of the Court was delivered by

GLOVER, J. This Court concurs with the Circuit Judge in his construction of the Act. The rational interpretation which he has adopted enables us to collect the intention and apply the provisions of the Act to cases that we must conclude were intended to be embraced and punished by it.

The Legislature could not have intended to punish a person who negligently suffers the fire to get without his own bounds and thereby injure his neighbor's fence, and not to embrace within the penalties of the Act, him who committed

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the wrong maliciously by setting fire to his neighbor's grass or fence. Such an interpretation would impute to the Legislature an intent not to punish wilful, but negligent acts, when attended with injurious consequences, and thereby secure impunity to the greater offender.

Motion dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER and MUNRO, JJ., concurred.

Motion dismissed.

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THE STATE vs. GEORGE E. DE BRUHL AND JESSE DE BRUHL.

Under the statute 22 and 23 Car. 2, c. 7, which provides, that "if any person shall, in the night time, maliciously, unlawfully, and willingly *burn, or cause to be burnt or destroyed*, any ricks, &c., barns, or other houses or buildings," &c., the injury, to come within the meaning of the statute, must amount, either to a total demolition of the building, or be such as unfits it for the purpose for which it was erected.

BEFORE GLOVER, J., AT KERSHAW, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"The defendants were indicted and convicted for destroying buildings in the night time. The Statute (22 and 23 Car. 2, ch. 7,) under which the indictment was framed provides, that 'if any person shall, in the night time, maliciously, unlawfully and willingly burn, or cause to be burnt or destroyed, any ricks or stacks of corn, hay, or grain, barns, or other houses, or buildings, or kilns.' &c.

"Richard E. West was building, but had not yet completed, nor occupied, a dwelling house, smoke house, and crib. The rafters of the smoke house were up and the ends weather-boarded, and the body of the crib had been raised. Between the evening of the 23d and the morning of the 24th of February last, the smoke house had been prized up and three logs taken out, and the top was so pushed back that it nearly fell, and the crib was let down at one corner.

"Jacob Young said, 'he had settled Richard E. West, his son-in-law, on this land, and that he had drawn a deed conveying it to his daughters, West's wife, and Susan, who is dead; but that the deed is not yet delivered.'

"The smoke house and crib were uninjured on Saturday, an hour before the sun set, and the next morning, between eight

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and nine o'clock, A. M., witnesses saw the condition of the body and roof before described. After dark, on Saturday, George E. De Bruhl threatened that he would in a short time, make a black cross mark on Jacob Young and West, and about 9 o'clock, at night, he and Jesse De Bruhl left their father's for George E. De Bruhl's residence, which is in the direction of West's. George E. De Bruhl was drinking, and they had a three gallon jug along.

"There was evidence in proof of ill-will between the parties, and pointing at these defendants as the perpetrators of the act; but which it is not necessary to report.

"I will only add, that the jury was instructed to inquire if it was done in the night time, and maliciously, unlawfully, and willingly."

The defendants appealed and now moved in arrest of judgment on the ground:

That the houses were not destroyed, as alleged in the indictment, but only injured.

And failing in this, then they moved for a new trial on the same, and also on the following grounds:

1. That there was no evidence that the act was done in the night time.

2. Because the houses were not the property of Richard E. West, as alleged in the indictment.

Taylor, Kershaw, for appellants.

Fair, solicitor, contra.

The opinion of the Court was delivered by

MUNRO, J. The only question to be considered is, whether the case made against the defendants comes within the pur-

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view of the Statute of 22 and 23 Car. 2, chap. 7, upon which the indictment is founded.

Notwithstanding a period of nearly two centuries has elapsed since the enactment of this statute, and almost a century and a half since its adoption into the criminal code of this State, with the exception of the case of the *State vs. Kirkpatrick* (2 Brev. 440), and the recent case of the *State vs. Bosse* (8 Rich. 276), I have been unable to find, after the most diligent search, a single case, English or American, in which its provisions have been adjudicated.

It appears from the circuit report, that the buildings consisted of a smoke house and crib, neither of which was finished, and the injuries done to them consisted in the defendants having prized up the former, and removing three logs, and pushing back the roof so that it nearly fell, and letting down the end of the crib.

If the words "or destroyed," be stricken out of the statute entirely, it is clear, that by no rule of construction, can its remaining language be made to embrace any injury to a building, other than to those, in which fire is the element used in the work of destruction—and this by the way is the construction that has been placed upon the statute as it now stands, by some of the members of the Court.

But, conceding the construction which was contended for in behalf of the State to be correct, namely, that by the insertion of those words into the statute, it was meant to include every kind of injury that might be done to a building whether by fire or otherwise,—it would, however, be a strained construction of the words "or destroyed," standing alone as they do, and unsustained by any thing in the context—to say nothing of the rule which enjoins a strict construction of penal enactments—to hold, that these words were intended to embrace within the provisions of this highly penal statute, every possible injury, however slight or trivial, that might be done to a building, merely because done in the night time; such for ex-

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ample as the breaking of a door or a window, or even to such injuries as those that were done to the buildings in question, by the defendants. When it is manifest, whether we resort to the context as furnishing an index to the scope and design of the authors of the statute—or to the ordinary meaning of the word “destroyed”—that its sole purpose was to include within its provisions, such injuries only, whether by fire, or otherwise, as would amount, either to a total demolition of a building, or such as would unfit it for the purpose for which it had been erected.

This view is we think fully sustained by the construction which has been given by the English Courts to a comparatively recent Act of their parliament, containing similar provisions to those contained in the one under consideration. The Act to which I refer is the 7th & 8th Geo. 4th, chap. 30, sec. 8th, which enacts “That if any persons riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully demolish, pull down and destroy, or begin to demolish, pull down and destroy any church or chapel, &c., or any house, stable, &c., shall be guilty of felony, &c.”

In *Ashton's* case, which will be found in Roscoe's Crim. Ev. 886; “The beginning to pull down, said Park, J., in a case where the prisoners were so charged—means not simply a demolition of a part, but of a part with intent to demolish the whole. If the prisoners meant to stop where they did (i. e. breaking windows and doors) and to do no more, they are not guilty, but if they intended when they broke the windows to go further, and destroy the house, they are guilty of the offence.” And in *R. vs. Adams*, 51 Eng. Com. Law, 168, Coleridge, J., said to the jury, “Before you can find the prisoners guilty, you must be of opinion, that they meant to leave the house no house at all in fact. If they intended to leave it still a house, though in a state however dilapidated, they are not guilty under this highly penal statute.”

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It is clear however that the defendants' motion in arrest of judgment cannot prevail, and for the reason, that the indictment sets out an offence that is clearly within the statute, and is therefore upon its face free from exception; and if it had been sustained by the proof, judgment must have been awarded upon it.

But the motion for a new trial must be granted; and it is accordingly ordered.

It is further ordered, that the prisoners be remanded to the jail of Kershaw District, and be let to bail, themselves in the sum of five hundred dollars, and two or more good sureties in the same sum among themselves.

O'NEALL, WARDLAW, WITHERS, AND WHITNER, JJ., concurred.

Motion granted.

Banks vs. Ingram.

H. R. BANKS vs. J. J. INGRAM. THE SAME vs. P. M. BUTLER.

Where a debtor, who has been arrested under *ca. sa.*, given bond for the prison rules, filed his schedule and made application for the benefit of the Insolvent Debtors' Act, is arrested under another *ca. sa.*, and gives bond for the prison rules, he need not file a schedule in the second case, but his schedule under the first bond, answers for both, and there is no breach of the second bond.

BEFORE GLOVER, J., AT SUMTER, FALL TERM, 1856.

The report of his Honor, the presiding Judge is as follows:

"These actions were brought within the summary process jurisdiction of this Court, on a prison bounds bond, given by S. W. Sullivan and the defendants, as his sureties.

"On the 10th of March, 1856, Sullivan was arrested on a *capias ad satisfaciendum*, at the suit of Perry Moses. On the 14th of April he filed his petition, praying for the benefit of the Insolvent Debtors' Act, and a notice of his application was published the 6th of August.

"In the mean time, to wit, on the 23d day of May, Sullivan was arrested on a *capias ad satisfaciendum*, at the suit of the plaintiff, Banks, and gave the bond which is the cause of action in these cases.

"Sullivan having filed his petition for the benefit of the Insolvent Debtors' Act, in the case of Perry Moses, and having rendered a schedule, and notice of his application having been regularly published, calling on all his creditors, it appeared to the presiding Judge that there had been no breach of the bond sued upon in these cases, and nonsuits were therefore ordered."

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The plaintiff appealed on the grounds :

1. That the testimony proved a breach of the bond, and the plaintiff was entitled to a decree.

2. That the principal in the bond, failed to comply with its conditions, and the decree should therefore have been for the plaintiff.

Moses, for appellant.

J. S. Richardson, jr., contra.

The opinion of the Court was delivered by

O'NEALL, J. Sullivan, the principal of the defendants in these cases, had been arrested (the 10th of March,) at the suit of another creditor, and on the 14th of April, filed his schedule, and petitioned to be discharged under the Insolvent Debtors' Act.

He was subsequently (23d May) arrested, at the suit of the plaintiff, and gave the bond on which these processes are founded.

The question is, was he bound to file in this plaintiff's case the schedule, which he had previously filed under his application for the benefit of the Insolvent Debtors' Act?

I think he was not. For all legal purposes, it must be considered as filed in this plaintiff's case, as well as the previous case. For, if the defendant, Sullivan, had been in jail, the sheriff could not have done more than lodge the plaintiff's *ca. sa.*, as a detainer. When in that case he appeared to be discharged, the plaintiff, Banks, as well as Moses, might have contested his schedule and showed cause against his discharge; if these objections had failed and the schedule had been assigned, Banks as well as Moses would have participated in the

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benefit, and the discharge of the prisoner would have operated to free him both from the arrest, and the detainer.

What difference can there legally be between actual confinement, and the prison rules, in reference to the effect of the schedule and the discharge? I confess I do not perceive any.

It is true, inasmuch, as the prisoner, Sullivan, in Perry Moses' case, had the benefit of the prison rules, the sheriff was bound to arrest him, and to take his bond again for the prison rules in place of the detainer above spoken of. But that is all which could be different from the case stated, as if he had been in actual confinement.

Subsequently to the trial of these processes, but at the same Term, Sullivan's application for his discharge, under the Insolvent Debtors' Act, was heard, and *he was discharged*.

This clearly is a discharge from the debt, or recovery of the plaintiff against him: and he never can contest the same. *Crane vs. Martin*, 4 Rich. 251, and *Hibler vs. Hammond*, 2 Strob. 105.

How then can he claim to recover against the defendants (sureties) that which he cannot recover against their principal?

The case of *Breeze vs. Elmore*, 4 Rich. 536, allowed to bail the benefit of their principal's discharge, as an insolvent; in another case, when it took place within the time allowed to the bail to make a render of their principal.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion refused.

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J. W. A. WOODBERRY vs. JOHN C. DYE.

Upon a note payable to the plaintiff, in which only initials of his Christian name were given, he sued, giving, for his Christian name, such initials:—*Held*, that defendant could not plead the misnomer in abatement; that he was estopped, by his admission in writing, from denying that such initial letters formed the Christian name of the plaintiff.

BEFORE WARDLAW, J., AT WILLIAMSBURG, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

“Sum. pro. on note. Plea in abatement, misnomer of the plaintiff.

“The note was payable to ‘J. W. A. Woodberry,’ and the defendant had rendered an account against the plaintiff, styling him, in a receipt subjoined thereto, ‘J. W. A. Woodberry;’ but the plaintiff’s true name was Joseph Waties Allston Woodberry.

“I sustained the plea, holding that the plaintiff should have known his own name, and that the defendant had not, by signing the note, and the receipt, precluded himself from denying that the initials mentioned in these papers constituted the true name of the plaintiff.

The plaintiff appealed, and now moved this Court to set aside the order of his Honor, sustaining the plea in abatement,

Because, it is submitted, that the defendant was estopped from denying the name of the plaintiff as alleged in the process, by the fact that he was styled by that name in the note signed by the defendant, and in this suit plaintiff was not

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bound to set out any other name than the one defendant by his note acknowledged.

Harlee and Pressly, for appellant.

The opinion of the Court was delivered by

O'NEALL, J. This case was decided below on the authority of *Norris vs. Graves*, 4 Strob. 32.

The authority which led to that decision was *Kennerly vs. Knott*, 2 Law Reporter, New Series, 186. The exception there was allowed on special demurrer. In *Norris'* case it arose and was allowed on a plea of misnomer.

In delivering the opinion in *Norris'* case, I took occasion to say, "if the note had been drawn payable to A. O. Norris, that then it is possible the case might have been sustained, on the ground, that the defendant by his own writing admitted the name to be in letters."

What was *there* put, as a possible case, is *now* the case to be decided. Although what was said there was a mere *obiter*, yet it was founded, as I think, on that which is seldom found to be erroneous, justice, even on a strict legal question.

I remember that Judge Colcock once said to me, "I always endeavor to ascertain, where the justice of the case is, and so decide, very sure that I can afterwards find the law to sustain me." This in most cases is true, and I know no better general guide for a Circuit Judge.

In this case the justice of the case is plainly with the plaintiff, and nothing ought to turn him round, except some inflexible artificial rule. We do not think the case of *Norris vs. Graves* furnishes *that*.

The defendant, both in the note, the cause of action, and the receipt mentioned in the report, has in writing admitted the plaintiff's name to be J. W. A. Woodberry. How can

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he plead a misnomer against his own admission? It seems to me he cannot.

In *Wilthaus vs. Ludecus*, 5 Rich. 326, the initials of the maker, endorser, and of the plaintiffs, the endorsees of the note, were used throughout the declaration: and to *these*, exceptions were taken by way of special demurrer: and it was held, that they could not be thus taken. This ruling is different from the English decision, which was made in conformity to rules of the Common Pleas on the subject. No such rules being with us, the exception could only be by plea in abatement—and was subject therefore to all the strictness required in such a plea.

In the opinion Judge Evans adopts almost literally the reasoning of Lord Campbell, in *Regina vs. Dale*, who contended very strongly, in that case, that consonants, as well as vowels, might be names, and that there was therefore no reason to insist, that words were absolutely necessary to make names.

On turning to *Regina vs. Dale*, 5 English Law and Equity Rep. 361, it seems to me that it is a strong authority for this opinion.

The proceeding *there* was a *scire facias* on a recognizance, taken before Lee B. Townsend, Esq., and J. H. Harper, Esq., and the objection was that their names were not fully stated. Lord Campbell, and his associates, denied that the rule of the Common Pleas extended to criminal proceedings, and overruled the objection. We have no rule extending beyond the precise precedent in *Norris vs. Graves*. In *Regina vs. Dale*, the party, *as here*, had acknowledged the name by his writing, indeed by a *quasi* record, the recognizance.

The decision in *Wilthaus vs. Ludecus* was followed in *Kinloch vs. Carsten*, 5 Rich. 330, and *Myer's Adm'or vs. Sealy*, Id. 474.

I think the exception to be made in this case is just as legitimate as to say the exception cannot be taken by special demurrer. We had no rule which compelled us to say the

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full name should have been spread on the record, and hence the party was driven to a plea of misnomer, which saves him from answering to any one save the person to whom he is legally liable to answer. His plea must give the party his true name. When he undertakes to do that, he is met, and as I think estopped, by his own admission in writing contrary to his plea.

The motion to reverse the decision below is granted.

WITHERS, WHITNER, and MUNBO, JJ., concurred.

Motion granted.

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WYLIE L. HARRIS vs. SAMUEL MCNINCH.

Assumpsit by W. H. against S. M. for five hundred and ninety-one dollars, for hire of wagon, team and driver. Before suit commenced, a creditor of W. H. had issued an attachment against him in North Carolina, and S. M., being made garnishee, was condemned to pay two hundred and forty-seven dollars and ninety-nine cents. W. H. had also drawn an order on S. M. for one hundred and seventy-two dollars, which S. M., after suit commenced, accepted in writing.

Held, that the order and attachment were no bar to this action.

Held, further, that the amount adjudged against S. M., in the attachment case, should be allowed as a discount.

BEFORE WITHERS, J., AT YORK, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows :

"The plaintiff brought *assumpsit*, on the 29th December, 1854, for the hire of wagon, team and driver, employed on the streets of Charlotte, from the 18th March to the 16th December, 1854. He claimed ten hundred and sixty-three dollars, reduced by credits allowed to five hundred and ninety-one dollars.

"The defendant assumed various grounds of defence, which involved much testimony. Many questions raised for decision and a tedious trial. But the grounds of appeal will be answered by a short statement.

"Before the plaintiff's writ was lodged, (which was 29th December, 1854,) one Young issued against him, in North Carolina, an attachment, claiming three hundred and seventy-five dollars and interest—attachment issued 15th November, 1854—served on defendant, as garnishee, 16th November, 1854. At April Term, 1855, of the Court in Charlotte, return having been made by defendant that he owed the plaintiff

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two hundred and forty-seven dollars and ninety-nine cents, to be paid at three subsequent periods, that sum to be paid at such periods, was condemned in defendant's hands by a judgment entered against him on Young's case.

"The plaintiff likewise, before he brought his writ, to wit, on the 11th November, 1854, gave to Lowry and Avery an order on the defendant for one hundred and seventy-two dollars, which the defendant refused to accept at first, and did not accept until after this action was commenced, (for so the jury found upon that point) and when he did accept, antedated the acceptance, which was in these words: 'I accept the within order, provided there be in my hands a sufficiency to pay it.'

"This order and the attachment, the defendant insisted, were a bar to this action. I overruled the position.

"The plaintiff insisted that the sum adjudged against the defendant in the attachment case, to wit, two hundred and forty-seven dollars and ninety-nine cents, should not be allowed as a discount. I overruled also this position, and it was allowed.

"The jury found for the plaintiff a verdict for one hundred and seventy dollars and forty-six cents, and interest from the 18th December, 1854."

The defendant appealed on the grounds:

1. Because his Honor erred in instructing the jury that the order drawn by plaintiff on defendant in favor of Lowry and Avery for one hundred and seventy-two dollars, dated November 11, 1854, (before the commencement of this action) did not bar the plaintiff's recovery to that extent, unless the order was accepted by defendant before the action commenced.

2. Because his Honor erred in instructing the jury that the attachment issued in North Carolina at the suit of R. H. Young vs. Wylie L. Harris, for three hundred and seventy-five dollars

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and interest, and served upon the defendant as garnishee, November 16, 1854, (before the commencement of this action) did not bar the plaintiff's recovery to that extent.

3. Because, it is respectfully submitted, the order for one hundred and seventy-two dollars and the attachment for three hundred and seventy-five dollars and interest, amounting in the aggregate to five hundred and forty-seven dollars exclusive of interest, exceeded the amount of plaintiff's claim, and constituted a complete bar thereto; and his Honor should have so instructed the jury.

The plaintiff also appealed on the ground :

Because his Honor erred in charging the jury that the sum of two hundred and forty-seven dollars and ninety-nine cents, condemned in defendant's hands, under the proceedings in attachment in North Carolina, although never paid, should be allowed as discount to plaintiff's demand.

Smith, for plaintiff.

Melton, for defendant.

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PER CURIAM. In this case we concur in the ruling of the Judge below, and find nothing in the verdict of the jury which appears to us to be erroneous.

The motion is dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurring.

Motion dismissed.

Sumner and Wife vs. Palmer.

SAMUEL SUMNER AND WIFE vs. ELISHA PALMER.

A purchaser of land at sheriff's sale, who had complied with the terms of sale, but had never taken titles, devised the land for life, with remainder in fee. About twelve years after the sale, the devisee for life released to the remainder-man, and gave him an order on the sheriff to make titles to him:—*Held*, That the sheriff then in office, the successor of the one who sold, could make titles under the Act of 1839, sec. 61, to the remainder-man.

In an action of trespass to try title by a purchaser at sheriff's sale, against the party as whose property the land was sold, the defendant is estopped from showing title in a third person whose tenant he claims to be.

BEFORE WHITNER, J., AT UNION, SEPTEMBER, EXTRA TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

“This was an action of trespass to try title; and plaintiffs claimed to have acquired defendant's title to the lands in dispute, under a sale of his interest therein, by B. Johnson, Esq., the sheriff of Union, made 7th February, 1843, under a *fi. fa.* in favor of *Edwards & Gowing vs. Elisha Palmer*. The lands were bought by one James Palmer, for the sum of one hundred dollars, the purchase-money paid, and by the sheriff applied to executions in his office. James Palmer received no deed from the sheriff, and by his last will and testament, bearing date 6th December, 1844, gave his interest in this land, on which he was living at the time of his death, and had been many years before, to his wife and mother, during their lives, and after their death to Mrs. Sumner, his daughter, the wife of Samuel Sumner, the plaintiffs in this suit. The mother of testator died, and Mrs. Sarah Palmer, the widow, executed an assignment of her interest, and by an

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order to the sheriff, directed titles to be made to her daughter 9th February, 1854. Accordingly, sheriff Gibbs executed a deed to plaintiffs, in virtue of the sale by his predecessor, 12th February, 1855. The land, it was said, had once belonged to the father of James and Elisha Palmer, and it was in proof that Elisha Palmer had lived on the land from his birth until the present time.

"The plaintiffs introduced, in the progress of the case, the record of a suit in equity, instituted by defendant, 29th April, 1851, for partition, against the plaintiffs and others. The claim to an interest in these lands, on the part of complainant in that suit, was resisted; and the bill was dismissed, because Elisha Palmer had no interest.

"The introduction of the deed from Gibbs was resisted, as unauthorized by the statute, not being to the purchaser, no proof being offered of any application to sheriff Johnson, and from lapse of time. The deed was admitted, and a motion subsequently submitted for a non-suit, resting on the same grounds, was refused.

"As matter of defence, the defendant offered to introduce judgment, and *fi. fa.*, in favor of *Pratt vs. Elisha Palmer*, confessed October 5th, 1845, which had been levied 28th October, 1845, on same land, and a sale made by same sheriff, Johnson, to one John J. Howard, for one hundred dollars, to whom Johnson, on payment of purchase-money, had executed a deed, bearing date 7th March, 1850, and admitted to record in register's office; and further, to prove that defendant was now the tenant of Howard. Objections were interposed as to the admissibility of this evidence, and although I was struck with the peculiarity of these matters of defence, going, it might be, to the avoidance of plaintiffs' deed, yet I felt constrained to hold that these were questions to be raised by Howard, and not by the defendant in execution, in an action by the first purchaser at a sheriff's sale; that the defence was liable to the objection long acted on in our courts, that the

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defendant could neither deny title in himself, nor set up a paramount title in a third person. I held that it was not competent, in this case, for the defendant to give in evidence the deed of Johnson to Howard.

"The jury returned a verdict for plaintiffs for the land in dispute, and thirty dollars damages."

The defendant appealed on the grounds:

1. Because the Court ruled that it was not competent to offer in evidence the deed made by B. Johnson, late sheriff, to John J. Howard, for the land in dispute, dated in 1850, to defeat the deed made by Gibbs, his successor, in 1854, to the plaintiffs, the defendant holding under said Howard as tenant.

2. Because the deed made by Gibbs, (as well as the assignment from Sally Palmer,) was inadmissible in evidence, and conveyed no legal title to the plaintiffs.

Herndon, for appellant.

Dawkins, contra.

The opinion of the Court was delivered by

WHITNER, J. The points raised in the grounds of appeal, involve inquiries into the competency of evidence rejected on the part of the defendant and admitted on the part of the plaintiffs.

I think the case will, perhaps, be more readily understood by reversing their order; and I proceed, therefore, first to inquire, whether the deed from sheriff Gibbs to plaintiffs was admissible. The Act of Assembly of 1839, (11 Stat. 38, sec. 61,) is very explicit. "In all cases where any sheriff shall have legally sold, or hereafter shall legally sell, any real or

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personal estate, and such sheriff is now dead, resigned, or out of office, or shall hereafter die, resign, or otherwise go out of office, before he shall have executed titles therefor to the purchaser, it shall be lawful for any subsequent sheriff of the same district, upon the terms of the sale being complied with, or satisfactory evidence produced that they have been complied with, to make and execute good and sufficient titles to the purchaser for the property sold."

From the earnest zeal with which this ground is pressed, I have thought it proper to present the entire section of the Act, and I ask merely that the facts established by plaintiffs, and as shown by the brief, may be reviewed. It will appear, that the lands of this defendant were legally sold by a sheriff who went out of office without having executed titles to the purchaser, who had paid the money, and thus complied with the terms of the sale; the most satisfactory evidence whereof existed, and the money applied to executions in the office. The purchaser died without having received a deed, and these plaintiffs, in virtue of his last will and testament, and an assignment regularly executed from the party succeeding to the estate of testator, and an order to the sheriff in like manner regularly executed, received from the successor in office the deed in question. Taking up the case as we are obliged, a branch at a time, what good objection existed to its admissibility when thus offered. Every requisition of the statute was met, and unless the right to a title deed was forfeited by the death of the purchaser, what else appeared as ground of objection. It cannot be maintained, that a purchaser at sheriff's sale may not rightfully transfer his interest. In fact, I do not understand this to have been seriously controverted in the argument. The case of *M'Elmurray vs. Ardis*, 3 Strob. 212, is directly in point. The time which had intervened constituted no bar. It is not to be found in the statute, or to be inferred from any recognised principle of law.

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In reference to the other ground of appeal, the report of the case sufficiently suggests the difficulty in the way of the defence attempted. A purchaser at a sheriff's sale acquires all the right and title to the land sold then in the defendant in execution. "In an action of trespass to try titles by the purchaser against the defendant, the defendant will not be permitted to give evidence that the title of the land was not in himself, but another, whose tenant he was." *O'Neill vs. Duncan*, 4 M'C. 246. Cases have been multiplied, and the doctrine is now familiar.

"The sheriff is the agent of the defendant in execution in selling his land to pay his debt, and hence the sheriff's deed operates very much as his own." "It is too clear to be questioned," says O'Neill, J., in a case of strong analogy, "that this defendant cannot set up a paramount title in another to defeat the purchaser of his own title." 2 Rich. 26.

The case is doubly fortified as against this defendant, who, by a written paper, set up on another occasion in a proceeding in equity, showed his admission of title in the purchaser at sheriff's sale, with whom he had treated for a repurchase. It is not the case cited by counsel of *Pope vs. Clark & Manning*, 2 Strob. 363, where a landlord had been admitted as a co-defendant. In such a proceeding, where one comes in by leave of the court, there is no surprise, and, to avoid the multiplicity of suits, there is propriety in enlarging the inquiry and permitting such title to be shown as would entitle to a recovery against the plaintiff, even although he was in possession and defendant in the action. The reason is manifest for adhering to rules, and the fact that another, in whom it is insisted there is a perfect paramount title, has not thought proper to assume the responsibility of taking his place on the record, but has chosen rather to conduct this contest behind one claiming as a tenant, and it may be wholly irresponsible,

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may afford a proper illustration of the wisdom of such rules.

- I have not entered upon any inquiry as to the relation of plaintiffs' deed to the judgment and execution under which the land was originally sold. It has not been necessary to the case made. Such a question on the part of the present plaintiffs, with others suggested on the part of the defendant, may find their solution when other parties present themselves on this battle-field, already somewhat notorious in our court.

The motion for a new trial is refused.

O'NEALL, WITHERS, GLOVER, and MUNRO, JJ., concurred.

Motion refused.

Smith vs. Hamilton.

NARCISSA SMITH vs. SAMUEL HAMILTON.

Where a female brings an action of slander for saying of her that she is the mother of a mulatto child, she need not aver in her declaration that she is unmarried, or that she is married to a white man, or that she is a white woman.

Where a female sues in her own name, the defendant by pleading the general issue, admits her to be a *feme sole*; and a plaintiff need not aver herself to be white, for that the law presumes.

BEFORE WITHERS, J., AT CHESTER, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows :

"The action was in slander, and the words charged and proved were, that the plaintiff had a mulatto child. The plea was the general issue,

"After the plaintiff closed her evidence, the defendant moved for a non-suit upon the grounds taken in the accompanying notice of appeal, to wit: that considering the import of the words, the plaintiff, to show them slanderous, should have alleged, in her declaration, that she was a white or unmarried woman; since she might be a free negro, or married to one; in either of which cases, to have had a mulatto child was only natural, and to say so of her would not be slanderous. I overruled the motion for non-suit; and the same, together with one in arrest of judgment, is renewed on the same grounds.

"The jury found for the plaintiff a verdict for \$3000. She proved her character to be good, and it was conceded, or at least was unassailed by the defendant, who offered no evidence."

The defendant appealed, and now moved this Court for a non-suit, and failing in that motion, then in arrest of judgment, on the grounds,

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1. The plaintiff should have averred in her declaration, that she was a white woman.

2. She should have averred that she was unmarried, or married to a white man.

3. Because the plaintiff's declaration is not sufficient, in law, to sustain the action.

Hemphill, Gaston, for appellant.

Boylston, M'Alley and M'Lure, contra.

The opinion of the Court was delivered by

MUNRO, J. It is very manifest, that upon neither of the defendant's grounds can his motion for a non-suit prevail; for by a familiar principle of pleading, if a plaintiff fails to exhibit in his declaration a complete cause of action, or there be a material defect apparent upon its face, such objection furnishes no ground for a non-suit, but the defect, whatever it may be, can only be taken advantage of, either by demurrer, or by motion in arrest of judgment.

This at once disposes of the question of non-suit, and brings us to the consideration of the remaining question, the motion in arrest of judgment.

To sustain his motion, the defendant relies, in his grounds of appeal, upon the insufficiency of the declaration in two particulars.

1. The want of an averment therein, that the plaintiff was a white woman.

2. The want of an averment that she was unmarried, or married to a white man.

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In considering the questions presented by these several grounds, it is proposed to reverse the order in which they are stated, by taking up the second ground first, so that the first step in the prosecution of the inquiry, is to look to the condition of things as presented by the pleadings, and in doing so, we find a declaration in slander, charging the defendant with having uttered and published, of and concerning the plaintiff, the following defamatory words, to wit: that she was the mother of a mulatto child.

The only plea to the declaration is the general issue.

Now what, it may be asked, has the defendant admitted by this form of pleading? The obvious answer is this—by a well established rule of pleading, by resting his defence upon the general issue, he has admitted one thing at least; he has admitted the plaintiff to be *sui juris*, that is, he has conceded that she is neither an infant, nor a *feme covert*, but that she is a *feme sole*, and of full age. Whether a widow or a maid, or whether white or colored, is immaterial, and therefore, in all respects legally competent to maintain the action.

If this be the correct view of the case, as it is presented by the pleadings, it also disposes of the other objection taken in this ground, to wit: the plaintiff's omission to aver, that she was married to a white man.

But conceding for the argument's sake, the plaintiff to have been a married woman at the time the cause of action accrued, it is clear that her husband, whether white or colored, if the legality of such an alliance as the latter can be recognised in this State, ought to have been joined with her in the action, (7 Rich. 343;) but it is equally clear, that the non-joinder of the husband could only have been taken advantage of by plea in abatement, and not by plea in bar, and least of all, by evidence under the general issue. "At least," says Mr. Chitty, "this rule obtains in actions for tort;" 1 Chit. Pl. 449.

But the fallacy in the argument that was urged to sustain the foregoing positions, will be found to rest upon the assump-

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tion, that the gravamen of the slander consisted mainly, if not entirely, in the use of the term mulatto, when it is obvious that the imputation of a want of chastity would have been just as complete, although certainly less aggravated, had that term been entirely omitted.

I now proceed to the consideration of the objection taken by the defendant in his first ground, as to whether it was necessary for the plaintiff to aver in her declaration, that she was a white woman.

It was conceded by the appellant's counsel, in his truly ingenious argument, that if the slanderous words set forth in the declaration had been spoken of an unmarried colored female, she might have maintained an action against the author of the slander.

Now if the position which I have attempted to sustain in considering the second ground be correct, namely, that under the plea of the general issue the defendant has conceded the plaintiff to be an unmarried female; it follows irresistibly, that it can make no possible difference, so far at least as the plaintiff's right to maintain the action is concerned, whether she be white or colored.

It is true, that the plaintiff's color might, and doubtless would have made, a material difference in the estimation of the jury; but this was a matter entirely for the consideration of the defendant, for if the plaintiff had really been a person of color, it was competent for the defendant to have shown it by evidence under the general issue, and if he has neglected to do so, he must take the consequences of his own neglect.

But is it necessary in any case for a party suing in the Courts of this State, to aver his or her *status* in the declaration?

In 1 Chitt. Pl. 226, it is said, "Where the law prestumes a fact, it need not be stated in pleading, and as it is an intendment of law that a person is innocent of fraud, or any other imputation affecting his reputation, the party insisting upon

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the contrary must state it in pleading," &c., &c.; and again, at page 364, "whenever the right of the plaintiff is implied by law, as the absolute right of persons, it is unnecessary to state the same." In *Calkwell v. Langford*, 1 M'Mul. 277, it is said, "The general inference is, that a party in Court is white until the contrary appears." See also *The State v. Schroder*, 3 Hill, 61.

To call a man a mulatto, has been held, from an early period in the history of our jurisprudence, actionable *per se*. *Eden v. Legare*, 1 Bay. 171.

This doctrine has been fully recognised in several subsequent cases, but in neither of them was it considered necessary there should be an averment in the declaration, that the plaintiff was a white man.

Should the plaintiff's *status* in any case form an element in the defence, it is entirely competent for the defendant to render it available by a proper mode of pleading, or by evidence under the general issue. Upon the defendant, however, the burden must rest.

The defendant's motions are therefore dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER and GLOVER, JJ., concurred.

Motions dismissed.

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A. W. THOMPSON *vs.* D. GOUDELOCK.

To plaintiff's declaration, defendant filed a demurrer, on 2d October, 1855.

On 11th October, 1856, plaintiff moved, that the case be put on the issue docket. A joinder in demurrer, without date, and which never had been filed, was exhibited:—*Held*, that plaintiff's motion was too late, a year and a day having elapsed, since any step was taken in the cause.

BEFORE WITHERS, J., AT UNION, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"At the close of the term of the Court, on Saturday, the issue docket having been some hours before closed, Mr. Thompson moved to put the case above stated on the issue docket. It had not been on that docket at March last, nor was it on at this term. A demurrer, for defendant, had been filed, October 2d, 1855, (I believe such to be the date,) a joinder was on the record, but without date, and it had found no entry in the Clerk's Record Book of pleadings, because (said the Clerk) he had never seen it.

"Mr. Goudelock and his Counsel objected to the motion, stating that the cause of action was a claim by the plaintiff, as executor, for extra compensation, brought against Goudelock, as Commissioner, that this claim had been of long standing, had proved embarrassing to the disposition of the estate, and to him as Commissioner, the same having been ordered in Equity to be distributed, and that he had proceeded to make distribution, and supposed this case ended, in consequence of its long dormant condition. Declining to interfere, I refused the motion. The case was made by statements at the bar, which I have above restated as well as I can."

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The plaintiff appealed, and now moved this Court for leave to have his case put upon the issue docket.

Because by law and by the practice of the Courts, the case should have gone upon the issue docket, a year and a day not having elapsed since the pleadings were made up.

Thomson, for appellant.

Herndon, contra.

The opinion of the Court was delivered by

WARDLAW, J. From the second day of October, 1855, when the defendant's demurrer was filed, until the eleventh day of October, 1856, when the motion to docket was made, no step seems to have been taken in this case. At the making of the motion, a joinder in demurrer was exhibited: but that may have been written on the day first mentioned, or may not have been written until the day last mentioned: it was not filed, and was unknown to the Clerk.

When the defendant filed his demurrer, he might, by taking out a rule to plead, have required the plaintiff to join issue within ten days; and upon the plaintiff's default after the expiration of the ten days, might have obtained an order for judgment, which could have been set aside upon the usual terms on the call of the inquiry docket at the next term, March, 1856. But no rule to reply having been taken out, or, if it was taken out, no order for judgment having been obtained, the ten days have no influence upon the case. In the actual state of facts which, by the neglect of strict practice on both sides, has occurred, the case has become discontinued by the lapse of more than a year, (or as we generally say, a year and a day,) without any stop. With this we suppose the defendant is content; and to it the plaintiff must submit. It is the result which must be attained, if the demurrer was

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filed without any rule to plead, or before the expiration of such rule: and no difference in the result is perceived to arise if, as has been now suggested at the bar, the case was on the inquiry docket, at October Term, 1855, and was then transferred by the defendant on the usual terms. Under the leave to transfer, the defendant was bound to plead an issuable plea, *instantly*—he did so. The plaintiff might have instantly replied and presented the issue for docketing: he did nothing for more than a year, and at the making of this motion was out of Court.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion refused.

Wilson vs. Railroad Company.

SOLOMON B. WILSON vs. THE WIL. AND MAN. RAILROAD
COMPANY.

The rule in *Danner's* case, (4 Rich. 329,) that a *prima facie* case of negligence is made out against a railroad company, where it is shown that *cattle*, pasturing on uninclosed lands, are killed by the train of the company, does not apply where the animal killed is a dog.

BEFORE MUNRO, J., AT DARLINGTON, SPRING TERM,
1856.

The report of his Honor, the presiding Judge, is as follows :

"The action was a case to recover damages for killing the plaintiff's dog. Sometime, either in January or February last, on a Sunday forenoon, the body of the dog was found dead upon the track of the road, by several persons who were returning from church. It was shortly after the passenger train had passed along the road. No one heard the whistle blow. The dog was proved to have been about ten months old; and was in a course of training for a yard dog, and his value was variously estimated by the witnesses at from ten dollars to seventy-five dollars.

"It appears that the road runs through the plaintiff's plantation, and crosses a mill road near to the plaintiff's residence, which is distant from the railroad about two hundred yards, and is surrounded by an inclosure; and that his negro houses are about thirty yards distant from the road, around which there is no inclosure.

"I stated to the jury the degree of negligence necessary to make out a *prima facie* case against a railroad, in reference to killing stock while pasturing in the forest, as laid down in *Danner's* case; and at the same time expressed a doubt as to the application of the rule in reference to the killing of dogs.

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"The jury found for the plaintiff thirteen dollars damages."

The defendants appealed, and now moved this Court for a new trial, on the ground :

Because his Honor should have instructed the jury that the plaintiff was bound to prove that the yard dog was killed by the negligence of the defendants, and that the presumption of negligence which arises from the killing of cattle or hogs would not be raised without further proof.

Dargan, for appellants.

Norwood, contra.

The opinion of the Court was delivered by

MUNRO, J. The rule which holds a railroad company responsible for killing cattle, is thus stated in the case of *Danner vs. The South Carolina Railroad Company*, 4 Rich. 329.

"When in an action the plaintiff proves no more, than that his cattle, pasturing on his own land, were killed by the passenger train of the company, in its passage along the road, he makes out a *prima facie* case of negligence, which entitles him to recover, unless the company, by proof of the particular manner, or circumstances under which the cattle were killed, rebut the presumption."

The above rule appears to be founded on this—that as it is not a trespass for cattle to pasture at large upon the uninclosed forest land in this State : so neither is it a trespass, if while roaming at large in pursuit of pasturage, they happen to stray upon the track of a railroad.

But surely no good reason can be assigned for including within the rule, an animal, that is not purely domestic, but whose nature is carnivorous, and if ever prompted by instinct, or appetite, to roam at large in the forest, it is fair to presume,

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that it is either in pursuit of game, or is upon a sheep-killing expedition.

But again, it appears from the testimony, that the dog in question was on a course of training for a yard dog—if this be so, assuredly, the domestic area was a far more suitable place for the development of its faculties, so as to fit it for the position it was destined to occupy, than by allowing it to roam at large upon the track of a railroad.

But if the rule in *Danner's* case be extended to the killing of dogs, we can perceive no good reason why it should not embrace every species of domestic animal, whether biped, or quadruped.

It would indeed be a startling doctrine to hold, that a train of cars, whether freighted with produce, or with passengers, and charged with the transportation of the government mail, should be arrested in its progress, and compelled at the hazard of responsibility, to come to a dead halt, whenever a domestic fowl, or perchance a yelping cur, should happen to take its stand upon the track, in defiance of the loud warning which is proclaimed by the motion of the train, and the action of the machinery.

To say nothing of the influence which such a doctrine would have upon the interests of railroads—it would certainly go far to diminish the almost incalculable benefits that are conferred upon society, by these important enterprises.

This Court is therefore unanimously of the opinion, that the rule in *Danner's* case does not apply to the killing of dogs.

The defendant's motion is therefore granted.

O'NEALL, WARDLAW, WITHERS, WHITNER and GLOVER, JJ., concurred.

Motion granted.

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H. H. WILLIAMS *vs.* H. G. HASELDEN.

After publication for a year and a day of the usual rule to plead in cases of attachment, plaintiff obtained, on the 21st November, 1855, an interlocutory order for judgment. On the 22d January, 1856, defendant appeared before the clerk, and put in special bail to the action, and at the call of the case on the inquiry docket at the next term, moved to dissolve the attachment, and for leave to plead:—*Held*, that he was entitled to his motion.

A defendant in foreign attachment, against whom, at the expiration of the usual rule to appear and plead, an interlocutory order for judgment has been entered, may, nevertheless, by putting in special bail to the action before the next term after the order was entered, entitle himself to an order to have the attachment dissolved, and for leave to plead to the action.

BEFORE MUNRO, J., AT MARION, SPRING TERM, 1856.

The report of his Honor the presiding Judge, is as follows:

“The plaintiff in the above case sued out a writ of attachment, returnable to Fall Term, 1854. On the 17th November of the same year, he filed his declaration, and after the publication of the rule to plead for a year and a day had expired, to wit: the 21st of November, 1855, the usual interlocutory order for judgment was entered by the clerk. On the 22d of January, 1856, the defendant having returned to the State appeared before the clerk, and put in special bail to the action, although I understand this was resisted by the plaintiff; and, on the call of the case on the inquiry docket, moved to dissolve the attachment, and to plead to the action; which motion I refused.”

The defendant appealed and now renewed his motion before this Court to dissolve the attachment and for leave to appear and plead to the action, on the grounds:

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1. Because, by the attachment Act of 1785, defendant has the right to dissolve the attachment by putting in special bail, at any time before judgment.

2. Because defendant was not concluded by the fact that the year and a day had elapsed before he put in special bail.

3. Because the Act of 1744, on which plaintiff relied, is inconsistent with and repugnant to the Act of 1785.

4. Because the refusal of the motion was in other respects contrary to law.

Evans, for appellant.

Phillips, contra.

The opinion of the Court was delivered by

WHITNER, J. The defendant had appeared before the Clerk and put in special bail, and unless he was then already concluded, his right to dissolve the attachment and plead to the merits would follow as a necessary consequence.

Such a construction of our Acts of Assembly and Rules of practice as will secure consistency and avoid multiplicity of suits is very desirable. We should not do to-day what we may have to undo to-morrow, unless driven by a stern necessity. That adjudication commends itself which will settle finally upon a single hearing, the rights of the parties.

In the inquiry I propose, I would first call attention to that feature in our scheme of proceedings in attachment, which secures to the absent debtor, if he shall appear within *two* years and disprove the debt, duty or demand, which shall have been recovered against him, the right in turn to recover

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full damages and costs for his *unjust vexation*, against the plaintiff in attachment. Act of Assembly, 1744, 8 Stat. 620, sec. 9.

In ordinary cases, the order for judgment made by the Clerk on the expiration of the rule, interposes no obstacle to the party in filing his plea. As matter of right, the order is vacated, if application is made on or before the second day of the term next after, and the party is permitted to plead *issuably* according to the Rule of Court.

The defendant in attachment is called by a rule of a year and a day instead of the thirty day rule. By its terms he is to *appear* and *plead*. Under our early legislation and the decisions thereon, the debtor could not plead without appearing, and could only appear by putting in special bail. If the defendant appears within the rule, his right to set aside the order, even although he had not filed his plea would be unquestionable. When special bail is entered the attachment is dissolved, and the proceeding thenceforth becomes one *in personam* and subject to the ordinary rules.

If this defendant is concluded, then, it is because of his failure to *appear* within the rule. Upon first blush, the precise phraseology of the Act construed literally, would seem conclusive, but the Acts are to be taken as constituting a system, and should be construed in reference to the subject of which they treat. In *Gray vs. Young*, (Harp. 40,) it is said, "the writ of attachment, although a sort of proceeding *in rem*, like any other original writ, is intended to bring the defendant into Court, and if he does appear and plead to the merits, like every other, it is *functus officio*." Its peculiar character is lost, and thence the proceeding is merely personal and must be governed by the same rules. I have already said that a common appearance gave no right to plead, speaking of course of a time anterior to Act of Assembly of 1845, the provisions of which Act, however, do not enter into consideration in this case. Hence, in *Acock vs. Linn & Lamsdown*, Harp. 368,

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though a common appearance was entered at the return of the writ, the plaintiff proceeded as if no appearance had been entered. On the expiration of the rule, and after an order for judgment, the Court refused to let the party in upon any other terms than his entering special bail to the action, and dissolving the attachment. In the opinion delivered, the language of Judge Chase, in *Campbell vs. Morris*, 3 Har. & McH., was adopted, that an attachment is to *compel* the appearance of the defendant, and when he comes in he is in the same relation that he would have been if taken on a *capias ad respondendum*, and cannot appear without bail.

Because the debtor places himself beyond the reach of his creditor as to his person, the property is substituted, but clearly the proceeding in its nature is not against the *goods* and the *person* at one and the same time. To the latter the creditor was entitled, as of right, at the institution of the suit, and to *coerce* the appearance the Statute gave the remedy. Thus, it is seen, the end and object of the law is attained when the action is converted from a proceeding *in rem* to a proceeding *in personam*. The Statute, however, though it provides the means whereby to secure an end, indicates a day, earlier than which the *final* judgment shall not be given. When the day, therefore, has elapsed to which the debtor was called, and he has not appeared, or, having appeared, he has failed to file his plea, the case goes upon the Inquiry Docket, when the Court may proceed to render final judgment. If the terms of the Statute should be held imperative, excluding the debtor at that stage and under all circumstances, it would be in contravention of well-settled practice in analogous cases, and not required by the object of the law. Defendants are admitted to plead under the rule of Court and often to appear under our practice on leave, even although the day has elapsed. The Act of Assembly of 1791, (7 Stat. 263,) gives to plaintiff in ordinary cases on the return of the writ the right to file his declaration and take judgment by default, *unless* an

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appearance has been regularly entered with the Clerk, during the sitting of the Court, and *unless* a plea is filed within one month after declaration. If such be the construction of this Act, equally favorable should be the practice in cases of attachment, and where the design of the law is so manifest.

The view taken by the Court derives great force from the Act of Assembly of 1785, (7 Stat. 214,) to which I have already adverted. In the *proviso* to Sec. 4, it is declared that all attachments *shall be* repleviable by appearance and putting in special bail *if by the Court ruled to do so*, thus intending to establish a uniform practice in all cases, or to conform the practice in the kind of proceeding therein authorized, to what was then considered the settled practice under the former Act. The case of *Fife & Co. vs. Clark*, 3 McC. 847, furnishes a just exposition of this Act. This Court is of opinion that the purpose of the Act on this subject is best attained by hearing the application and vacating the order for interlocutory judgment, with leave to plead on proper terms. The motion now submitted is granted, and the case is ordered to be restored to the Inquiry Docket.

O'NEALL, WARDLAW, and WITHERS, JJ., concurred.

Motion granted.

Wolfe vs. Sharp.

THE ADMINISTRATOR AND ADMINISTRATRIX OF JACOB A.
WOLFE vs. M. R. SHARP.

An answer of a witness to one of the plaintiff's interrogatories in chief was excluded, because it appeared, that there was written evidence of the matter testified to, which was not produced:—*Held*, that the plaintiff might read, as evidence, the answer of the same witness to a cross-interrogatory, in which he repeated the testimony given in answer to the excluded interrogatory in chief.

At an administrator's sale, made by leave of the Ordinary, an entry made by his clerk, in conformity to the result announced by the cryer, in the presence and hearing of all parties, is sufficient to charge the purchaser.

In a suit brought to recover the difference between the amount bid, at a sale by an administrator, and the amount for which the property was re-sold, the purchaser having failed to comply with the terms of the first sale, interest *eo nomine* may be recovered—the conditions of the sale being in writing.

BEFORE GLOVER, J., AT RICHLAND, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows :

“At a sale of the real and personal estate of the late Jacob A. Wolfe, on the 9th, 10th, 11th, and 12th of January, 1854, the defendant purchased personal property—chiefly slaves—to the amount of ten thousand nine hundred and ninety-six dollars; and, not complying with the conditions of sale, as is alleged, the property was re-sold at his risk, on the 31st of January, 1854. At this sale, a stranger, calling himself Gadsden, purchased some of the slaves, and not complying with the terms of sale, these were again re-sold on the 24th of February, 1854.

“The action is *assumpsit*, and is brought to recover the difference between these sales.

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"Matthew Hall, who was the auctioneer at the first sale, was examined by commission on behalf of the plaintiff. In answer to the seventh direct interrogatory, Hall recited the terms of sale, and stated that they were publicly read. An objection, by the defendant, to the admissibility of this evidence, was sustained on the ground, that the paper from which the auctioneer read should have been produced. Responding to the first and second cross-interrogatories propounded by the defendant, Matthew Hall says that the terms, which were written by John Fox, were publicly read, and that purchasers were required to give notes payable at twelve months without interest and with approved security. Several witnesses proved that the terms of sale were announced publicly, and some of them, that the defendant was near enough to hear.

"I believed that the evidence offered, in proof of the conditions of the sale, was sufficient to go to the jury, and the motion for a non-suit was refused."

The defendant appealed and now renewed his motion for a non-suit, upon the grounds:

1. Because, by the proof of the plaintiffs, there were written or printed conditions, or terms of sale, and they were therefore bound to produce them, or account for their loss.

2. Because it was clear from the plaintiffs' proof, that if there was any contract at all between the parties, such contract was under the Statute of frauds and perjuries of 29 C. 2, in force in this State, and was void under the 17th section of that Statute.

3. Because his Honor, the presiding Judge, it is respectfully submitted, erred in permitting this very brief and loose statement of Hall, the plaintiffs' witness, as to the terms of this contract, in answer to a cross-interrogatory to go to the

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jury as evidence of that contract, after his Honor had previously ruled that the plaintiffs, having proved that there were written or printed terms or conditions of sale, were bound to produce them.

And failing in that motion, then the defendant moved for a new trial on the same grounds, and also upon the grounds:

1. That the finding of the jury on the point of the compliance by the defendant with the terms of sale was against the clear and direct evidence.

2. That the jury, by their verdict, allowed interest *eo nomine* in favor of the plaintiffs.

Pearson, Tradewell, for appellants.

Tally, Arthur, contra.

The opinion of the Court was delivered by

O'NEALL, J. In considering this case, I will first take up the first and third grounds together.

1 and 3. There is no doubt, if, as in *McBride vs. Ellis*, 9 Rich. 269, the whole of the interrogatories in chief are swept away, the cross-interrogatories and answers cannot be read. But that is not the case here. Only one answer, that to the seventh interrogatory in chief, was excluded on account of conflicting with a rule of evidence: the cross-interrogatories and answers were not thereby excluded. In *Pulaski, Jacks & Co. vs. Ward & Co.*, 2 Rich. 121-2, it was said, "It has always been allowed to either party to use the questions of and answers to his adversary." The second cross-interroga-

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tory was perfectly independent of the interrogatories in chief, and was a distinct admission by the defendant that "the terms of sale were twelve months credit without interest, purchaser to give note with good security." The witness answers reiterating the terms, as the defendant stated them, and as the plaintiffs would have proved them, by the seventh interrogatory in chief. We think the judge was right in allowing the cross-interrogatory and answer to go to the jury. The defendant has only realized on this occasion what often occurs, that a cross-examination proves the plaintiffs' case.

2. Under the defendant's second ground, arises the question, whether the memorandums in writing were sufficient, under the 17th sec., 29 Car. 2, to charge the defendant? And here we must look to the sale bill; were the entries in it made by a competent person to charge the defendant? The rule is settled, that an auctioneer is the agent of both parties, and his entry is enough to charge vendor and vendee. The same rule was extended to the Commissioner or Master in Equity, in *Gordon vs. Sims*, 2 McC. Ch. 151. It will be remembered, as the reason why I notice this case, that the Commissioner was not the crier of the sale, another person did that duty. He (the Commissioner) was the agent of the Court, and of the parties to make the sale, hence his entry, and not that of the crier's was looked to. There is in this respect a marked difference between administrators' sales, and those of a vendue master. The latter is authorized by both parties to make the sale, hence as in *Entz vs. Mills & Beach*, 1 McMull. 453, he must make the entry, and his clerk cannot. There is another and perhaps a better reason why he must make the entry; his book containing such entry is by law evidence of the sale. *Bennett ads. Carter*, Dud. 142. The cases of *Cathcart vs. Keirnaghan*, 5 Strob. 129, and *Simmons vs. Anderson*, 7 Rich. 67, sufficiently show that sales by administrators are not governed by the rule of *Entz vs. Mills & Beach*,

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and that an entry made by the clerk of the administrator and administratrix, in conformity to the results announced by the crier, in the presence and hearing of all concerned, is sufficient. The administrator and administratrix, it must be remembered, sold under the authority, of the Ordinary. His order, like the decree in chancery, authorized the sale, and fixed the terms, and hence all persons, the crier and clerk, who are necessary to make the sale, may well be regarded as the agents of the administrator and administratrix, the vendors, and the purchaser, the vendee. Such is the invariable usage, and it would produce immense confusion to decide against it.

In this case, we have the defendant's admissions of the terms of the sale in the cross-interrogatories, and further, in writing, that he did buy at the sale, in his note offered to the administrator and administratrix. The only remaining fact wanting, to charge him, is the property purchased and the amount. This is fixed by the testimony of Fox, proving the sale bill.

4. The only remaining ground, is that which relates to the finding of interest *eo nomine*, on the sum found for the plaintiff.

I have never been satisfied with *Ancrum vs. Sloan*, 2 Speer, 594. That was an action on the warranty of a pair of horses, and the jury found for the plaintiff, a sum of money with interest from the sale. Unquestionably that was right under the rule settled by *Furman vs. Elmore*, decided in 1812, 2 N. & McC. 189, note. The rule established by it, was, that the purchaser on a warranty, where there was a breach, should recover the purchase-money and interest, so as to place him in *statu quo* before the sale. But whether the decision in *Ancrum vs. Sloan*, be right or wrong, is unimportant here. In this case the interest was clearly recoverable. For here the recovery is upon a written contract for the payment of money, at a time certain, and in such a case the rule is well

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settled that interest may be found, as it was in this case, though I always prefer, that the interest should be computed and added to the principal and the aggregate found by the verdict.

The motions for nonsuit and new trial are dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO JJ., concurred.

Motion dismissed.

Dinkins *vs.* Samuel.

MICAJAH DINKINS *vs.* MUSCO SAMUEL.

E. M. in consideration of natural love and affection, *gave, granted, bargained and sold*, a tract of land to his cousin, in fee, reserving the use to himself for life :—*Held*, that the deed was good as a covenant to stand seized to uses.

Deeds intended to operate one way may operate another, if the intention to pass an estate cannot otherwise be subserved.

The relationship of cousin is sufficient to sustain a covenant to stand seized to uses.

Slight evidence *held* insufficient to rebut the presumption of legitimacy —the party charged to have been illegitimate being dead, and his father and mother having also, been long since dead.

BEFORE O'NEALL, J., AT EDGEFIELD, FALL TERM, 1856.

Trespass to try title to a tract of land containing seventy-five acres. Elijah Murphy, being the owner of the land, executed a deed for the same, as follows:

“State of South Carolina,

“Edgefield District.

“Know all these men by these presence, that I, Elijah Murphy, of the district and State aforesaid, have, for and in consideration of the natural love and affection which I bear unto my nephew John Dinkins, and for the further consideration of the sum of ten dollars to me paid by said John Dinkins, the receipt whereof is hereby acknowledged, given, granted, bargained and sold, and by these presents do give, grant, bargain and sell, unto said John Dinkins, all that plantation or tract of land, whereon I now live, and containing seventy-five acres, be the same more or less, adjoining lands of Benjamin R. Tillman, Musco Samuel, Mrs. E. Samuel and Mrs. Mathis; together with all and singular the hereditaments, rights and appurtenances whatsoever, to the said tract

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of land belonging, or in any wise appertaining. To have and to hold all and singular the premises before mentioned unto the said John Dinkins, his heirs or assigns for ever. Provided, nevertheless, and under the express condition, that the said John Dinkins will and shall permit me to live on and make use of said tract of land or plantation, in every respect, and to all intents and purposes, as if it still belonged to me, during my natural life and no longer, and after my death to belong solely to him, the said John Dinkins, his heirs or assigns for ever. And I do hereby bind myself, my heirs, executors, administrators, or assigns, to warrant and for ever defend said premises unto the before mentioned John Dinkins, his heirs or assigns, against all and every person lawfully claiming, or to claim the same, or any part thereof. In witness whereof I have hereunto set my hand and affixed my seal, this twenty-fourth day of December, in the year of our Lord, one thousand eight hundred and thirty-nine.

his

ELIJAH MURPHY. [L. s.]

mark.

Signed, sealed and delivered in the presence of

MICAJAH DINKINS,

JOHN DINKINS,

EDWARD DINKINS.

It appeared in evidence, that John Dinkins, though styled in the deed, the nephew, was in fact only the cousin of Elijah Murphy. John Dinkins conveyed to the plaintiff. Murphy, the grantor, resided on the land till he died, on the 11th April, 1853.

His Honor held that the deed was good and effectual to pass the land. In all its terms it conveyed the estate presently, the possession only being postponed. If necessary, it might be considered and construed as a covenant to stand seized to uses. Such deeds had been ruled to be good as to

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personalty; and he saw no reason why the same rule should not apply as to real estate.

Verdict for the plaintiff.

The defendant appealed.

Carroll, for appellant.

Adams, contra.

The opinion of the Court was delivered by

WITHERS, J. If the plaintiff derived no title from John Dinkins, it was because John Dinkins derived none from Elijah Murphy, by means of the deed executed by the latter, a copy of which accompanies the report of the circuit judge. The consideration for that deed must be confined to the natural love and affection of Elijah Murphy for John Dinkins, (who is called his nephew, whereas he was really his cousin,) for though the consideration of ten dollars, is also mentioned, and the receipt of it acknowledged, there was in fact no money paid, or agreed to be paid. It is, therefore, not a deed of *bargain and sale*: It is not a conveyance by *lease and release*, nor a deed of *feoffment*. The only question is, whether it can operate by way of *covenant to stand seized to uses*. The words, "give, grant, bargain and sell," are employed. The word "grant," will serve for such a covenant, if the consideration be sufficient; *Roe ex dem. Wilkinson vs. Tranman et al.*, Willes, 682: "that would be sufficient (says Willes, C. J.) according to all the cases." In the same case will be found strong support of the doctrine, drawn from the old authorities on common assurances, that deeds which are intended and made to operate one way may operate another way, if the intention of the parties to pass an estate cannot otherwise be subserved, the dictum of Coke Lit. 49, that such benign rule

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of interpretation did not apply where a man might "pass lands either by the common law, or by raising of an use and settling it by the statute," to the contrary notwithstanding. That dictum, it was said, had been repudiated for more than an hundred years.

The serious question raised here, however, was not that this deed could not be construed, upon its face, to operate as a covenant to stand seized, but that the consideration of blood, peculiar to such a deed, was wanting. "A covenant to stand seized to uses, is where a man covenants to stand seized of them to the use of his wife, his child or kinsman." Butler's notes, 2 Thos. Coke, Lit. Appx. 553. The relationship of cousin is sufficient; such was the degree of consanguinity in the case above cited from Willes, and no question was made upon that fact. But it was assumed, in the argument before this Court, that the grantor, Elijah Murphy, was a bastard, and could therefore, according to the common law, be the cousin of nobody. The report shows no such fact, but the contrary. The judge, who presided, has referred to his notes of evidence, and they supply the following only: One witness said that by reputation, William Murphy was the father of Elijah, and the mother of the latter was called Molly. A deed by William Murphy in favor of Mary Dinkins, dated June, 1794, conveying fifty acres of land, had, in relation to her, these words, "formerly called my wife." Two witnesses said, that John Dinkins was not the nephew, but the cousin of Elijah Murphy.

To bastardize the latter we must convert reputation, reported by one witness, into an established fact, that he descended from William Murphy and a woman named Molly; that Mary Dinkins and Molly were one and the same person; that the words cited from the deed of 1794, referring to a period prior to that date, establish the relation of adultery between William Murphy and Mary Dinkins, and that if Elijah Murphy descended from them, he was born

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out of wedlock, whereas, for any thing that appears, they may have intermarried before his birth. These facts must be assumed, upon such evidence as is stated, that suspicion may be converted into fact. This ought not to be done, in order to make words, used more than sixty years ago, by one long since dead, in relation to another also long since dead, and referring to a period anterior to that even, operate to make a bastard of one who is himself dead, and avoid his deed. If the law be astute, as it is, to maintain written instruments, in a benign spirit towards those who make them, and those who would take interest under them, rather the more so when time has swept off the author and those who could fix facts with certainty; if charitable presumptions are brought to the aid of questions of fact, of circumstances, and transactions, obscured by the dust of antiquity, surely all will agree, that such vigilance and such presumptions are eminently due from judges and juries, when, to the usual basis of them, is added the question of the good name of those who are dead and living, and the title of the latter to the immunity of the law's notice and protection. It was well said, therefore, in the case of *The Legatee and Executrix of William Johnson, Jr. vs. The Executor of William Johnson, Sr.*, 1 Des. 595, as follows: "the evidence of legitimacy was very slight, but the Court would presume a marriage after the lapse of thirty years, especially as all the parties were dead: and if a contrary presumption should prevail, it would have the effect of bastardizing a person after his death, which would be contrary to every principle of law, justice and equity." Indeed, we have venerable legal authority upon this point; for in *Burg's case*, 5 Coke, 98,(b) it was resolved, under circumstances strongly adverse to actual belief, that children did really proceed from the putative father, as follows: "*Et semper præsimitur pro legitimatione puerorum, et filiatio non potest probari.*" Such presumption need not be extended grudgingly by the common law towards those who would otherwise fare worse

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under its maxim than that of the Romans ; since our law will not legitimize any but one born in wedlock, and not him always, whereas the civil law treated as legitimate all, though born out of wedlock, if their parents afterwards intermarried.

We, therefore, see nothing to warrant the conclusion, that the deed in question was not founded on the consideration of lawful blood, which makes it good as a covenant to stand seized to the use of him from whom this plaintiff acquired title, and consequently the motion ought to be dismissed, and it is ordered accordingly.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Pringle vs. Rhame.

JAMES M. PRINGLE vs. JOHN C. RHAME.

Where, after a sale, the consideration of which is the vendor's antecedent indebtedness to the vendee, the vendor retains possession of the slave sold, under a stipulation to pay hire, such stipulation takes the case from within the rule of *Smith vs. Henry*, 1 Hill, 16, and the question of fraud is one of fact for the jury to decide.

BEFORE GLOVER, J., AT SUMTER, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows :

"This was an action of trover to recover damages for the conversion of a slave named Flander.

"Edwin D. Pringle, who had before been jointly interested in Flander, became the sole owner in February, 1850, and on the 15th March, 1858, transferred him, by bill of sale, to the plaintiff. No money was paid at the time of the sale; but Edwin D. Pringle, as the legal representative of his father's estate, was indebted to the plaintiff, as a distributee, and this was the consideration given for Flander, leaving a balance still due to the plaintiff as distributee. Flander remained in possession of Edwin D. Pringle, on hire, for which he gave a note for seventy-five dollars to the plaintiff. Spencer Davis also gave his note for the hire of Flander the next year: but he continued in possession of Edwin D. Pringle until the defendant, as sheriff, sold him on the 4th June, 1854.

"The plaintiff lives in Florida and has removed all his negroes there, except Flander, who was left because his wife and family are here. A negro woman and children, the property of R. M. Pringle, who also lives in Florida, were likewise left in possession of Edwin D. Pringle. In March, 1853, Edwin D. Pringle was pressed by his debts and was then, and still continues to be, insolvent.

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"By virtue of two executions entered in the sheriff's office on the 30th April, 1853, (one in favor of *McCarter & Allen vs. Edwin D. Pringle & Co.*, for forty-six dollars and twenty-seven cents, and interest and costs, and the other in favor of *Harral, Hare & Co. vs. Washington Pringle, Edwin D. Pringle and others*, for thirty-one dollars and thirteen cents, and interest and costs,) Flander was levied upon by the defendant, as sheriff, on the 10th of October, 1853, and was sold on the 4th of June, 1854, the plaintiff's agent being present and forbidding the sale. The sheriff's sales book states, that Flander was sold the 4th of June, 1854, under four cases in favor of *Burkmeier & Bailey vs. Edwin D. Pringle*, and bought by Burkett for thirty dollars.

"An execution was offered in evidence in favor of *Wm. C. Dukes & Son vs. Edwin D. Pringle and Wm. A. Colclough*, for seven hundred and ninety-nine dollars and eighty-four cents, which was entered in the sheriff's office the 23rd of October, 1852, and on this, from the sheriff's book, a small balance of about three dollars appeared to be due, for, I believe, sheriff's costs. Wm. A. Colclough stated, that he was the surety and paid this case and authorized the attorney to satisfy it, and he is satisfied that he is not liable for one cent on that execution either for debt or costs. He was afterwards reimbursed for the amount which he paid by the sale of Edwin D. Pringle's land.

"In March, 1853, William Hancock was overseer for Edwin D. Pringle, and the plaintiff, who was there, said to the witness that he had better quit, as he would not get his pay: witness replied that Edwin D. Pringle had Flander, and plaintiff rejoined, that his brother had gotten him to take Flander to prevent the sheriff from selling him. He said he was not going to take him to Florida, and that Edwin D. Pringle was to have him back.

"I instructed the jury, that the circumstances attending the sale of Flander were not conclusive evidence of fraud, and

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submitted to them, whether the evidence showed fraud or want of fair dealing between the plaintiff and Edwin D. Pringle. Their attention was also directed to the execution in favor of William C. Dukes & Son, and they were instructed to inquire if it was satisfied.

"The jury found a verdict for the plaintiff for the value of Flander."

The defendant appealed and now moved this court for a new trial on the grounds:

1. Because his Honor instructed the jury, that the sale of a chattel in consideration of a pre-existing debt, the chattel remaining in possession of the vendor, was not fraud *per se*, and therefore incapable of explanation.

2. Because, at the time of the levy, there was in the sheriff's office another execution against the vendor, of date anterior to sale to plaintiff, unsatisfied, or, if satisfied, no notice thereof had been given to sheriff.

3. Because the facts proved fraud, and the jury should so have found.

Moses, Spain, for appellant.

Haymsworth, Green, contra.

The opinion of the Court was delivered by

WITHERS, J. The leading question presented by this case is, whether it is concluded by the rule derivable from *Smith vs. Henry*, 1 Hill, 16. In that case as in this the facts concurred, to wit: that a debtor sold personalty, (a slave in the present instance, several in the other,) to an antecedent creditor, and the possession was not changed, but in each case

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remained with the debtor. In *Smith vs. Henry* the debtor continued to use the property as his own, there being no fact established that he was to pay any hire; whereas in the present case a note was given for hire by the debtor. Does this fact, supposing the contract for hiring to be *bona fide*, distinguish the two cases, and vindicate the doctrine held upon circuit, that possession remaining in the vendor upon the contract of hiring opened the inquiry, as to fraud in the sale, and carried it to the jury as a question of contested fact?

There is no doubt we must give an affirmative answer, and maintain, that the case of *Smith vs. Henry* does not apply, where such a contract for hire, *bona fide*, is made between vendor and vendee.

For this we have the clear and distinct authority of Judge Harper himself, who pronounced the opinion in the case of *Smith vs. Henry*. This appears in the case of *Jones and Briggs v. Blake and Wife*, 2 Hill, Ch. 636-7. In that case the stipulation to pay hire was adjudged to take it out of the principle of *Smith vs. Henry*, and it is affirmed, that the language used in the latter case and the quotations from *Twyne's* case and *Shep. Touchstone*, introduced to support it, clearly import a principle which cannot apply where the debtor retains the possession, after an absolute sale, in pursuance of an honest stipulation for hire.

By consulting the case from 2 Hill, Ch. cited above, it will be seen, that the principle of *Smith vs. Henry* was, that though the law will not *allow a debtor to prefer one creditor over another; he will not be allowed to secure an advantage, (that is, an advantage in relation to property, profit or pecuniary advantage,) at the expense of his creditors, as the price of such preference. The creditor will not be allowed to give a bribe, which means, in law a pecuniary benefit, as the price of the preference given to him over other creditors. "In this case,

* So in the opinion.—R.

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(says Chancellor Harper,) the proof is distinct and certain, that the donor was to pay hire for the slaves. Can I say that his retaining possession under this stipulation was the securing a benefit to himself? I do not see how. In general a party who hires slaves may be supposed to do so for his own convenience. But if the price be full and fair the law must regard the transaction as an exchange of equivalents." As to the attempts which, the Chancellor concedes, such a construction will call forth to "evade the rule as laid down in the case of *Smith vs. Henry*," he observes; "but it must be the business of the court to guard against evasions. If the stipulation were kept secret between the parties themselves—if the hire were very inadequate—if it remained for a long time not paid or demanded, all these would be circumstances to show the stipulation to be colorable or evasive." (Although the word "donor" is used above, the fact of the case was that the slaves were claimed as having been transferred to pay an antecedent debt due from Goodwyn to his daughter, Mrs. Blake, precisely of the character of the debt owing by Edwin D. Pringle to the plaintiff, in the case now under consideration.)

We have then an exposition of *Smith vs. Henry* peculiarly authoritative, which shows that the doctrine of that case does not exclude the evidence of hiring as matter to be weighed upon the question of fraudulent sale as between debtor and creditor. It results, necessarily, that the circuit court could not exclude the evidence of hiring by the vendor, and if not, that it could not hold the transaction before it to be subject to the legal presumption of fraud *per se*; that the question of fraud must go to the jury who have a right to determine it. The complaint here is not that the jury were not properly admonished as to the consideration of the fact of hiring, but it is, that the ruling on circuit did not exclude the whole influence of that fact. According to the exposition of *Smith vs. Henry*, already referred to, with which this court concurs, the instruction now insisted on, ought not to have been given.

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If we were to go back to the progenitor of *Smith vs. Henry*, (*Twyne's Case*, 3 Coke R. 80,) much might be gathered in support of the exposition we have adopted; but that examination can be made by him who has occasion to make it, and need not burthen this opinion.

The case of *Fulmore & Mouzon vs. George S. & Thomas Burrows*, 2 Rich. Eq. 95, has been cited to show, that an agreement to pay hire and notes executed for it will not withdraw a case from the conclusive presumption of fraud. Upon examining that case it is found, that the fact of hiring was heard, as a part of the case, was considered, and was adjudged to have no weight because it was itself held to be merely pretensive, and, therefore the rule of *Smith vs. Henry* was applied to that case. If the jury had so disposed of the like fact in the present case, and we should have been quite content if they had, we should have found here also a proper instance for the application of *Smith vs. Henry*.

In the case of *Motley vs. Albert*, 11 MSS. 34, the sale was attacked upon the ground that there was no consideration at all for the property pretended to have been purchased: and the effort to rebut the continued possession of the vendor by evidence of hiring was held unsuccessful, for such evidence, as to any period of time, was extremely obscure, indefinite and uncertain, and no evidence at all of hiring was given for three or four years before executions were levied upon the property; but it must be observed that evidence as to hiring was heard and considered, which ought not to be, if from the two concurring and precedents facts which make the case of *Smith vs. Henry*, the law has drawn a conclusive presumption of fraud. Thus much for the leading question in this cause.

The remaining question was, whether, if the sale to the plaintiff were exempt from fraud, an execution, lodged before such sale, was satisfied in full, or whether a small balance was not due. That point produced a contest in evidence, and we see no warrant to overturn the conclusion of the jury, to

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whom it was referred, with such instructions by the court as have originated no objection, touching them, in the grounds of appeal.

The general conclusion is, that the matter of fraud, in this instance, was a question of fact, and not of legal presumption conclusive and irrebutable; that the other point also presented an inquiry of fact, and whatever we might have concluded, if lawfully charged with the questions of fact, we ought not to invade the province of the jury; and must adjudge this appeal to be dismissed.

O'NEALL, WARDLAW, WHITNER, GLOVER, AND MUNRO, JJ., concurred.

Motion dismissed.

Mack and Smith vs. Garrett.

JAMES MACK AND W. T. SMITH vs. THOMAS GARRETT.

Where an applicant for the benefit of the insolvent debtor's Acts, who is at large under bond to keep the prison rules, has been convicted of fraud, it is proper for the circuit judge to hear and determine a motion for his re-arrest.

Such motion may be made, either at the term when the defendant was convicted, or at a subsequent term.

If made at a subsequent term, the defendant should, it seems, have reasonable notice of the motion.

There are cases where the defendant may be convicted and retaken, and yet the condition of the bond not be broken.

In all cases the bond continues until the defendant is discharged or retaken.

BEFORE GLOVER, J., AT SUMTER, FALL TERM, 1856.

Under *ca. sas.* issued by the plaintiffs respectively, the defendant had been arrested and given bond for the prison rules. He applied for the benefit of the insolvent debtor's Act. At Spring Term, 1856, his application was heard, and upon suggestion filed by the plaintiffs, he was convicted of fraud; he appealed, and at May Term of the Court of Appeals, abandoned his appeal. At this term the plaintiffs moved for an order, as follows: "It appearing to the Court that Thomas Garrett, defendant in the cases stated, was convicted of fraud under the insolvent debtors' Acts, at the last term of this Court, and that his appeal from said conviction was abandoned at the May Term of the Court of Appeals. On motion of Richardson and Haynsworth, plaintiffs' attorneys, it is adjudged and declared, that the said Thomas Garrett is no longer entitled to the benefit of the prison rules; and it is ordered, that the sheriff of Sumter District do take him into custody forthwith, and hold him, as upon the original

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arrest, until the debt, interest and costs, in each of the cases stated, be fully paid and satisfied."

This motion was refused by his Honor.

The plaintiffs appealed, and now moved this Court to grant the order moved for on the circuit, with modifications, if deemed proper.

Richardson, for appellant.

The opinion of the Court was delivered by

WARDLAW, J. The plaintiffs' motion on circuit was refused, because it appeared to the Circuit Judge not to be his duty to advise either plaintiff or sheriff. If the defendant was subject to re-arrest, it was thought that no order was necessary either to authorize the plaintiffs to direct the re-arrest, or to require the sheriff to obey proper directions.

It is, however, the opinion of this Court, that the necessary inquiry should have been made, and if the case was found a suitable one for re-arrest, that the plaintiffs' motion for an order commanding the sheriff to make the re-arrest should have been granted.

By the general scheme of the Act of 1788, (5 Stat. 78,) and subsequent Acts concerning insolvent debtors, (1833, 6 St. 491; 1836, 6 St. 556; 1840, 11 St. 121; 1841, 11 St. 153;) the bond for the prison bounds is considered a substitute for the body of the debtor. Wherever the condition of the bond has been broken, the plaintiff, waiving his right to sue on the bond, has a right to require that the debtor's body should be closely incarcerated, until full satisfaction shall have been made of the action or execution on which he was confined before he gave the bond. The converse is, however, not always true: for there may be under the 7th section of the Act of 1788, cases where the body might be retaken, yet the condition of

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the bond not be broken; as where the debtor may have gone out of the prison walls after his confinement and before the bond, or may have made a fraudulent conveyance, or an undue preference, contrary to the provisions of the Act, but not such as to constitute a false return. In all cases the bond continues until the debtor has been absolutely discharged, or has been retaken. In some cases, at least, the plaintiff, or even the sheriff without directions from the plaintiff, may certainly retake a debtor not discharged, as in the case of escape, provided for by the 11th section of the Act of 1788. And we mean not now to decide that in the case before us, or in any case where there is a present right to retake if the plaintiff should so desire, a judge's order is necessary; but where such order can be conveniently obtained, it may prevent oppression, mistake, hesitation and loss, and in a proper case should be granted. The Act of 1759, in the sections which contemplate the remanding or recapture of a debtor, require a judge's order. (Sect. 1, 4 St. 88; sect. 13, Ib. 92.) Even under the 10th section of the Act of 1788, which specifies liability to be arrested again, as one of the consequences of a false schedule, which was added to the consequences mentioned in the 15th section of the Act of 1759; because under the latter Act, the prisoner was presumed to be yet in actual custody; some judicial ascertainment of the liability is necessary. *Akin v. Moore*, 1 Hill, 475. In the case of *Hall v. Taggart*, Dudley, 370, Judge Evans recognised the propriety of an order given by a commissioner of special bail, for the sheriff to retake a debtor, after his discharge was refused.

In general, the debtor must be present at the rendering of a verdict unfavorable to his application, and if then the plaintiff should signify his desire to have the body recommitted to prison, the judge may make a proper order, with a full understanding of the circumstances. If the debtor should then prevent the plaintiff's motion, (as it is said he did here by appeal, and as may be done in other cases by various subterfuges), or

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Mack and Smith vs. Garrett.

if the plaintiff should not then have made up his mind as to the course he would take, the debtor will remain in the bounds at the risk of the sureties to his bond, and upon a future motion by the plaintiff, the case may not be understood without inquiry. In this case we do not know exactly what was found by the verdict, or what may have occurred since; and therefore we will give the debtor the chance of being heard.

It is ordered, that the defendant, Thomas Garrett, do show cause at the next Court of Common Pleas to be held for Sumter District, why his body should not be committed to close confinement in the jail of Sumter District, and be held there under the writs of *capias ad satisfaciendum*, in the cases of the plaintiffs mentioned in the title of this opinion, until the debt, interest, and costs in these cases respectively be paid.

And it is further ordered, that a proper rule according to the preceding order, be signed by the Clerk of Sumter District, and be served on the said Thomas Garrett, at least ten days before the next Court of Common Pleas for Sumter District.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ.
concurred.

Motion granted.

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G. T. DORTIC *vs.* JEFFERS, COTHRANE AND COMPANY.

Where a commission merchant sold goods for his principal, without disclosing his agency, and being indebted to the purchaser, gave him his due bill for the amount of his indebtedness:—*Held*, in an action by the owner for the price of the goods, that the purchaser could not set-off, or claim as payment the amount of the due bill.

BEFORE WHITNER, J., AT EDGEFIELD, SPRING TERM,
1856.

The report of his Honor, the presiding Judge, is as follows:

"This action was brought to recover one hundred and seventy-nine dollars and sixty-nine cents, the price of four bales of bagging, sold in the months of December and January, 1851-2, to defendants, by one Lafitte, an auctioneer and commission merchant in Augusta, Georgia. The goods had been sent to Lafitte by Dortic for private sale, but were in fact sold at auction for cash, without any notice of such sale being on account of another.

"It was in proof that auctioneers in Augusta are required to give bond and security, and that it was the custom to look to the auctioneer for proceeds of sale, made by them. The owners of the goods or persons on whose account sales were often made, never being disclosed.

"The defendants had other dealings with Lafitte: as auctioneer, he had sold goods on their account.

"The second day of January, 1852, being subsequent to the sale of three of the bales of bagging as above, Lafitte gave his due bill to defendants for one hundred and twenty-nine dollars and twenty cents, 'balance on account.' The fourth bale was entered in book, as sold third day of January, 1852, for forty-five dollars and fifty-six cents.

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"The book-keeper, who was examined by commission, gave rather a confused statement of the settlement between defendants and Lafitte, and the reasons that induced the due bill. Lafitte died some time after, and an administration was taken. He was spoken of as insolvent, but whether on proof, or mere statement of counsel I cannot say—any fact deemed material can be supplied by a reference to the commission, which appellant's counsel will have before the Court of Appeals.

"The questions were, whether there was proof of delivery, such as to charge the defendants,—whether on the case made, the defendants were not entitled to have set-off, or deducted from plaintiff's demand, the amount of the due bill, and whether there was not sufficient evidence of payment, in whole or in part? The evidence was submitted to the jury with instructions to shape their verdict as they might find the fact. If the agency of Lafitte was neither disclosed in fact, nor to be inferred from the transaction itself, the jury were told that the defendants might treat it as a dealing with Lafitte as principal, so far at least as might be necessary to protect themselves from loss. The suit being by another, inasmuch as discount could only be allowed *stricti juris* of mutual demands between the same parties, and therefore a recovery over could not be had by defendants as might be, if suit was brought by Lafitte, nevertheless *pro tanto* it might be regarded as a just defence in the reduction, or bar of plaintiff's demand; again, if it should be found that a settlement made had included this demand in whole or in part, it was a good payment accordingly as they might find.

"The jury seem to have attained the conclusion, that the first sales were paid to Lafitte, and either rejecting the legal principles held in favor of defendants, or not regarding the facts as justifying their application, returned a verdict for amount of last sale, forty-five dollars and fifty-six cents."

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The plaintiff appealed, and now moved this Court for a new trial on the grounds:

1. Because the note of A. Lafitte, the auctioneer, in favor of defendants, was permitted to be given in evidence by them as a discount against the claim of plaintiff.

2. Because the jury was instructed that the verdict in the case should be the difference between plaintiff's claim and defendants' discount.

3. Because it was held, that the name of the plaintiff should have been disclosed by the auctioneer to defendants at the time of said purchase as owner of the goods sold to defendants.

Magrath, for appellant.

Carroll, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case it cannot be pretended that the note or due bill of Lafitte can be set up as a discount against the plaintiff. It is not between the same parties.

It is supposed, however, that it is *quasi* payment to the deceased Lafitte, who sold the plaintiff's goods to the defendants. But it can have no such effect. For, if it had been so regarded, there was no necessity for a due bill, its amount would have been deducted.

The reason given by Grenville, the clerk of Lafitte, in the answer to the sixth cross-interrogatory, why the due bill was given, shows most clearly that the amount was not considered as a payment. For he tells us it was given because the defendants were charged on the books with the proceeds of the bagging belonging to the plaintiff. This, as I understand

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the proof, is the same as saying the defendants were to pay for the bagging to the owner Dortie, and Lafitte was to pay them his own indebtedness.

In his answer to the third cross-interrogatory, Mr. Grenville tells us, the bagging was sold by Lafitte for the plaintiff, not as an auctioneer, but as a commission merchant.

In *Atkinson vs. Teasdale*, 1 Bay. 295, it was settled, as far back as 1798, that debts due by a factor cannot be set off against the demand of the owner of the property sold by him.

According to this principle, the due bill could not be set off, or allowed, in any shape.

The verdict deducting the due bill from the amount of the plaintiff's demand is wrong.

The motion for a new trial is therefore granted.

WITHERS, GLOVER, AND MUNRO, JJ., concurred.

Motion granted.

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R. W. WALKER, Sheriff, *vs.* JAMES W. RILEY.

In an action upon a prison bounds' bond, to a plea of performance, plaintiff replied, that the applicant had gone beyond the rules; and defendant rejoined, that the goods of the applicant were out of the district, and that the applicant was compelled to leave the bounds to deliver them: *Held*, on demurrer, that the rejoinder was bad.

An applicant for the benefit of the prison bounds' Act, is bound to make actual delivery of the goods to his assignee, or do that which is equivalent thereto; a mere readiness and willingness to deliver is not enough.

BEFORE O'NEALL, J., AT BARNWELL, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of debt on a prison bounds' bond. The defendant pleaded performance—the plaintiff replied, setting out *inter alia*, that the prisoner, Miles A. Riley, was ordered to be discharged upon the condition that he should, within a time specified, deliver the contents of his schedule to his assignee, Thomas Youmans, and that he did not so deliver; and for further breach, that the said Miles departed from the bounds (the limits of the Judicial District.) The defendant rejoined that the said Miles was ready and willing to deliver, and did place the contents at a place agreed upon by and between the said assignee and Miles, for the said assignee to receive; and to the further breach, that his (the said Miles') goods were in Beaufort District, and that he was compelled to leave the bounds to deliver the same. To the first part of the rejoinder, the plaintiff surrejoined by traversing, and issue was taken; to the second part he demurred, and the defendant joined in demurrer.

"The case was tried upon the issue of fact. It appeared that Miles A. Riley, for whom this defendant was surety, in his schedule set down three beds and furniture, his wearing

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apparel and sundry accounts. All these were assigned without reservation: and the said Miles was ordered to be discharged, upon the condition that he delivered the same to his said assignee within a time limited.

"Miles A. Riley proved that he told his said assignee, on the day of his discharge, that he would leave for him at Mr. Trowell's, the accounts mentioned in his schedule; that the assignee said nothing; that he according left, within the time limited, the accounts at Mr. Trowell's; that he wrote to the said assignee that he had so left them. The assignee did not take them away; that he, Miles A. Riley, *afterwards* collected twenty-nine dollars upon them, and paid it to the *defendant*. His three beds, he said, were all which he had; that they were at Mr. Fitz's, in Beaufort District; that he had not at all interfered with them since his assignment.

"It appeared that the assignee did receive the letter spoken of by Miles A. Riley. It also appeared that the defendant in this action, after suit brought, offered to pay him the whole amount of Miles A. Riley's schedule, interest and costs, which he refused.

"I thought the plaintiff was plainly entitled to recover. The jury thought otherwise, and found for the defendant.

"After the rendition of the verdict, the plaintiff moved for judgment on the demurrer. It was plain that the defendant's surrejoinder was a departure in pleading, but I thought, after a verdict for the defendant, I could not award judgment for the plaintiff."

The plaintiff appealed, and now moved in arrest of judgment, on the ground, that his Honor should have sustained the *general* demurrer of the plaintiff.

Failing in that, he then moved for a new trial, on the ground, that the verdict is not only entirely unsupported by the testimony of the defendant's witness, (the only witness examined in the case,) but is directly contrary to that testi-

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mony, and contrary to the charge of his Honor, and should have been for the plaintiff.

Aldrich, for appellant.

Owens, contra.

The opinion of the Court was delivered by

MUNRO, J. In this case, two issues are presented by the pleadings, both of which arise out of the defendant's rejoinder to the plaintiff's replication; one of which is an issue of law arising under a demurrer, and which the plaintiff insists, in his first ground of appeal, should have been sustained by the Circuit Judge. The other is an issue of fact, which having been resolved by the jury in favor of the defendant, the plaintiff now moves for a new trial, on the ground, that the verdict was directly contrary to the evidence, and against the charge of the Circuit Judge.

As the solution of both these questions depend upon the provisions of the fourth Section of the Prison Bounds' Act of 1833, 6 Stat. 493, it is proper I should refer to it at once; it is as follows:—

“In all cases where a prisoner applies for the benefit of the Prison Bounds' Act, the Judge, or Commissioner, before whom the application shall be made, shall not discharge him from his confinement until the property contained in his schedule, is produced and delivered up to the assignee of such prisoner, if it has been within the power of the prisoner to deliver up the same since his arrest.”

To the declaration the defendant pleaded performance generally, to which the plaintiff replied by assigning two breaches, one of which is, “that the principal, Miles A. Riley, had departed from the prison bounds, (the limits of the Judicial District.)” To this the defendant rejoined, “that the said

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Miles' goods were in Beaufort District, and that he was compelled to leave the bounds, to deliver them." To this the plaintiff demurred, and the defendant joined in the demurrer, so that the question presented by this state of the pleadings is, whether the rejoinder is a legal answer to the breach assigned in the replication.

In 1 Chitty's Pl. 651, it is said, "A rejoinder is the defendant's answer to the replication, and is governed by the same rules as those which apply to pleas, with this additional quality, that it must support, and not depart from the plea"—and at page 644, it is said:—"A departure in pleading is said to be, when a party quits, or departs from the case, or defence which he has first made, and has recourse to another; it occurs when the replication or rejoinder contains matter not pursuant to the declaration or plea, &c., and which does not support and fortify it. A departure may be either in the substance of the action, or in the defence, or in the law upon which it is founded."

Assuming the prison bounds' bond to have been drawn in conformity with the requirements of the Act of 1883, and testing the matter set forth in the rejoinder by the rule laid down in Chitty, it is clearly obnoxious to the charge of a departure from the defence set forth in the plea of performance, both as regards the facts, as also the law upon which it is founded; for conceding the property contained in the prisoner's schedule to have been in another district, it was nevertheless constructively in his possession, and as completely subject to his control, as if it had been in the District of his confinement. This being the case, it was his imperative duty to have had it transferred to the latter place, and ready to be delivered to the assignee in compliance with the condition of his bond, and the requirements of the law. It moreover appears, that ample time had elapsed between his arrest and his discharge to have enabled him to do so. Certain it is, no valid excuse

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has been furnished by him for his failure, and least of all for his departure from the prison bounds.

Had the prisoner been an applicant for the benefit of the Insolvent Debtors' Act, his departure from the bounds before the delivery of the assigned estate, might not have amounted to a forfeiture of his bond, under the Act of 1841; but that Act applies exclusively to the Insolvent Debtors' Act; see the construction given to it, in the case of *Adams v. McMullan*, 4 Rich. 9. But the explicit language of the Act of 1838, admits of no such construction; the condition of pre-delivery of the assigned estate being imperative, unless the prisoner can clearly bring himself within the exception in the Act—this not having been done in the case before us, the plaintiff's demurrer to the rejoinder must be sustained.

In reference to the other breach assigned in the replication, and upon which issue has been taken, it is sufficient to remark, that a readiness and willingness to deliver to the assignee, the property contained in the schedule, is not, as we have seen, a compliance with the requisitions of the law; there must be an actual delivery, or that which is equivalent thereto; the allegation in the rejoinder, that the assignee assented to the property being left at a place agreed upon between him and the prisoner, was by no means sustained by the proof.

To say nothing of the fact, of the prisoner's having since his departure from the bounds, collected a part of the assigned estate, and paid it over to the defendant; the verdict of the jury is in all other respects, so contrary to the evidence, and so palpably in the face of the law, that the plaintiff's motion for a new trial must be granted—and it is so ordered.

O'NEALL, WARDLAW, WITHERS, WHITTNER and GLOVER, JJ., concurred.

Motion granted.

Chalk vs. McAlilly.

THE ADMINISTRATORS OF GEORGE CHALK, vs. SAMUEL
McALILLY.

For damage to the land of their intestate, in his life time, by damming the water in a stream and backing it on the intestate's land, case cannot be maintained by the administrators.

After judgment on demurrer, a motion to amend cannot be allowed.

BEFORE WITHERS, J., AT CHESTER, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"The action was a case for damage to the land of the intestate, in his life time, by obstructing the natural and accustomed flow of a stream, by the defendant's mill-dam below, and unlawfully throwing back water on the mill and land of the intestate above, and thereby injuring him, in his life time, in both respects. The defendant demurred generally. The question was, whether such a cause of action survived to the administrators. I held and adjudged that it did not, and therefore sustained the demurrer. Afterwards a motion was made on the part of these plaintiffs for leave to add to their declaration counts in assumpsit. I refused the motion, as not proper to be granted after judgment on general demurrer—besides the further consideration, that the amendment looked to the joinder of different forms of action."

The plaintiffs appealed on the grounds;

1. Because his Honor should have overruled the demurrer.
2. Because the plaintiffs, according to the law in this State and the decisions in the English courts, were entitled to sustain their action in this case, and so his Honor should have ruled and ordered.

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3. Because the order, made by his Honor, is contrary to law and the justice and equity of the case.

Eaves & Thomson, for appellants.

Witherspoon, contra.

The opinion of the Court was delivered by

O'NEALL, J. We concur in the ruling of the Judge below. At common law, (1 Chitty, Pl. 67,) even in cases of injuries to personal property, if either party died, in general no action could be supported, unless in some way the injury could be converted into a contract implied by law. But by the Stat. 4 Edw. 3, c. 7, 2 Stat. 425, an action was given to executors for "a trespass done to their testators, as of the goods and chattels of the same carried away in their life time." 1 Chit. Pl. 68, 69. Under this Statute, Mr. Chitty tells us an action was allowed to an executor for every description of injury to personal property, whatever the form of the action may be. But he also tells us, that no action can be maintained under the Stat. 4 Ed. 3, c. 7, for an injury done to real property, and to remedy this very matter, the Stat. 3 & 4 Wm. 4, c. 42, § 2, was passed. Id. 69. This last Statute is long since we emerged from British rule, and can have nothing to do with this case, except it be to show that the Stat. 4 Ed. 3, c. 7, cannot be construed to embrace real property.

The only case which in this State has gone counter to the English decisions, is that of *Nettles' Executors vs. D'Oyley*, 2 Brev. 27.

It is difficult to conceive how that case could be sustained. For the injury *there*, arising from the sale of their testator's land by the neglect of the defendant, was a plain injury to real property: and according to all the English cases, no action could be maintained. The judges there seem to regard the

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action as maintainable under the rule that "for every injury done to the *estate* of a testator or intestate, a right of action survives to his representatives." This, if admitted, would not sustain the case. For the real estate does not go, or descend, to the executor or administrator, but to the devisees or distributees; and hence I confess, I think the case was decided wrong. But, conceding it to be law, it cannot help these parties. For there the injury proceeded upon the neglect of a public officer, and upon the wrong enforcement by him of a written contract of the testator, the mortgage, and might be therefore regarded in some degree, as *quasi ex contractu*. This case is a plain unmitigated tort done to the land of the deceased, resulting in consequential damages merely, and the administrators have no right to maintain the action.

Nor can they have any right under the Act of 1789, 5 Stat. 111. The crop, as the intestate died after the 1st March, is assets in the plaintiffs' hands, and if the overflow of the defendant's mill-dam *that year*, had injured the crop on the land of the intestate, then indeed an action might have been maintained by the plaintiffs, but no such allegation is made in the declaration.

The motion to amend could not be allowed after judgment on general demurrer. *Moore vs. Burbage*, 2 McM. 168. But I confess I do not see how the defendant's injury could by any ingenuity be turned into a contract. The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

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PLANTERS' BANK OF FAIRFIELD *vs.* THE BIVINGSVILLE COTTON MANUFACTURING COMPANY.

Where the charter of an incorporated Company declared that nothing therein contained should exempt the members "from all liabilities pertaining to general partners:"—*Held*, That the members were liable to creditors of the Company, as partners, and might be sued as such, under the corporate name.

The appointment of an agent with authority to bind the corporation, may be implied from the acts of the Company, and need not be under seal.

Where the members of a corporation are, by their charter, liable as general partners, the Company is bound by the act of a member, acting within the scope of the business of the corporation, as in the case of an ordinary firm:—*Semle*.

The members of an incorporated Company being liable, by their charter, as general partners, L., the acting member, who did all the business of the Company, drew a bill of exchange in his own name, styling himself agent of the Company. In an action against the members in the corporate name charging them as drawers, the plaintiff was non-suited. On appeal, *held*, That it should have been submitted to the jury to determine, whether L. drew the bill as the authorized agent of the Company, or in his character as partner.

BEFORE WITHERS, J., AT FAIRFIELD, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"This action was in assumpsit, upon the subjoined bill of exchange, addressed to Messrs. Flint & Bingham, New York, and by them accepted, to wit:

"Ninety days after date, pay to the order of E. C. Leitner, at the Corn Exchange Bank, New York, twelve thousand five hundred dollars, and charge the same to account of

E. C. LEITNER,
Agt. Bivingsville C. M. C.

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"On the back appeared the names E. C. Leitner, George Leitner, Simpson Bobo, B. B. Foster; the last three (there is little, if any, doubt,) are spurious endorsements.

"This bill was negotiated to the plaintiffs upon discount by E. C. Leitner, in person.

"The writ and declaration are against E. C. Leitner and George Leitner, as co-partners, trading under the name and style of the Bivingsville Cotton Manufacturing Company, and they are alleged to be the sole stockholders in the corporation. The evidence was to the effect, that they owned all the stock, when the bill was drawn and negotiated, and long before; and further, that E. C. Leitner was the active and acting manager of the business, which was spoken of by witnesses as a cotton factory, producing cotton cloth and yarn, carried on within a few miles of Spartanburg Court House, E. C. Leitner residing at the factory, and his family with him for a part of the time.

"These said two persons were sued as partners, by reason of a proviso in the Act of 1838, (8 Stat. 463,) which gave (in usual terms,) a corporate existence to Simpson Bobo, James Edward Henry, E. C. Leitner, David Dantzler, James Bivings, and others, and those who now are members of the Bivingsville Cotton Manufacturing Company, and such other persons as may become members thereof, by the name and style of 'The Bivingsville Cotton Manufacturing Company.' The second clause of said Act, after conferring the usual powers and privileges, as to succession, seal, the right to sue and be sued, specifies as follows: "and have and enjoy all and every right and privilege incident and belonging to incorporate bodies: *Provided*, That nothing herein contained or hereby provided, shall, in any manner, exempt the said members *from all liabilities pertaining to general partners.*" Upon the footing of this proviso the action was brought against the existing stockholders as partners. The motion for nonsuit rested, in part, upon the contrary view—and while I was

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rather inclined to concur with the view presented for the defence upon this point, I granted the motion for nonsuit with a stronger reliance upon an additional ground, to wit: that there was no evidence to show that the negotiation of this bill of exchange was within the competency of E. C. Leitner, whether regarded as the agent of the corporation or a stockholding partner.

"The evidence that can have any bearing upon the question of authority to raise money upon such instrumentality as this bill of exchange, was derived from three witnesses of Spartanburg District, to wit: Messrs. G. W. H. Legg, H. H. Thompson, and John Bomar, who used very much the same phrases in most of their answers, and may be summed up as of the following purport:

"That several hundred bags of cotton (Bomar said about one hundred and fifty thousand pounds,) were used annually at the factory; that cotton cloth and yarn were made, and the products, or if not both, the cloth, was sent, in considerable quantity, to Charleston, sold for cash by agents, upon whom E. C. Leitner drew for proceeds. (Mr. Thompson said this: 'they sold and bartered their manufactured cotton in Charleston and different parts of the State; at the North; in Tennessee and North Carolina, as I believe, and have been informed by E. C. Leitner.' There was no other evidence of any dealings at the North;) that E. C. Leitner was held out as the 'active and acting agent;' that he lived at the place of business generally, since 1847, when and ever since (said Bomar) he and George Leitner became the sole stockholders; ['I have had in possession (said Bomar) a writing, authorizing E. C. Leitner to act as agent at one thousand five hundred dollars a year till the property was paid for, which has not been done yet. I don't know that George Leitner signed it; don't know of any other power by George to E. C. L. to sign his name;'] that George Leitner was understood to be a resident of Fairfield district, and to have property in

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Florida, and was alternately in the one and the other State. Mr. Thompson used this language: 'I only know from his conduct, that E. C. L. was agent. He acted as such, was so reputed and treated generally. I know of no written power from George to E. C. Leitner to use his name, or bind him in any way, further than to bind him as partner, and George ratifying his acts as agent of the company.'

"I find nothing else on my notes touching the question of the scope of authority of E. C. Leitner as agent or partner; nor was there any evidence to show the application of the proceeds of the bill of exchange, in whole, or in part, to the use of the corporation or partnership; nor any evidence of any kind tending to show a ratification; none to show that such a bill as this, on a firm in New York, at ninety days, producing a loan of money, had ever been made and negotiated before by E. C. Leitner, at all, much less that any thing of this kind had been done by authority of George, by previous mandate or subsequent ratification; or within his knowledge; for to sell or to barter goods, or draw on agents in Charleston, or even elsewhere (if that was proved) for proceeds of cash sales already in hand, was regarded as a wholly different sort of transaction; quite a different course of business.

"Other positions for nonsuit were urged, to wit: that there was no proof of proper demand of payment on the acceptors—and none of proper notice to drawers; none of notice to George Leitner. My mind did not rest on these positions on the question of nonsuit. The protest produced, seemed to be ample evidence of adequate demand on the acceptors; and though the testimony was not full, clear, precise and positive, as to notice having been duly given to George Leitner, yet I was quite satisfied that such question should have been submitted to the jury. If such grounds are relied on by the counsel concerned to maintain the nonsuit, my memoranda of what the only witness to those matters said, will serve to enable the Court of Appeals to pass judgment upon them.

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"From my judgment of nonsuit an appeal goes up on grounds annexed."

The plaintiff appealed, and now moved this Court to set aside the nonsuit.

1. Because it is respectfully submitted, the evidence of the authority of E. C. Leitner to draw the bill of exchange sued upon, so as to make defendants liable, was sufficient to authorize the sending of the case to the jury.

2. Because the evidence sufficiently showed that the drawing of the bill of exchange sued upon was within the scope of the authority of E. C. Leitner, and should have been submitted to the jury on the evidence adduced.

McCants, Boylston, for appellant.

Sullivan, Gregg, contra.

The opinion of the Court was delivered by

GLOVER, J. In support of the nonsuit two grounds have been assumed:

1. That the action cannot be maintained against the stockholders as general partners, and

2. That there was no evidence showing that E. C. Leitner was competent to negotiate the bill of exchange, either as the agent of the corporation, or as a general partner under the proviso of the Act.

1. For the protection of the creditors of the Company, the intention of the Legislature manifestly was to render the stockholders responsible beyond the liability which attaches

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to them as corporators. They are to stand in the relation of partnership debtors to those with whom they contract, and a security is thereby provided for the payment of their debts beyond the assets of the corporation. The Act confers upon the members, corporate powers, to be exercised under the grants in their charter, for the benefit of the Company; but it also expressly provides, that they shall not be exempt from the liabilities pertaining to general partners. To enforce this liability, creditors must sue the members constituting the corporation, as partners under the corporate name, which is the statutory designation, applicable to them as defendants, in either character. The proviso subjects them to all the hazards and responsibilities attaching to persons who are associated together for the transaction of business without a charter. Their primary liability on contracts made by the corporation, is in their character as partners, and no obligation is imposed by the Act on creditors to exhaust the assets of the corporation, nor is there any condition which requires them to pursue it to insolvency before they shall commence their actions against them as general partners. In this respect the Act differs from the statutory provisions of other States, which make the absolute liability of individual stockholders, for debts due by the Company, depend upon its dissolution, or upon the return of an execution against the corporation unsatisfied. *Bank of Poughkeepsie vs. Ibbotson*, 24 Wend. 473; *Moss vs. Oakly*, 2 Hill. N. Y. R. 264.

We are, therefore, of opinion, that the members constituting the Bivingsville Cotton Manufacturing Company, are primarily liable as partners, under their corporate name, to the creditors of the corporation, and that the objection to the plaintiff's declaration, in this respect, is not well taken.

2. The motion for the nonsuit was granted with stronger reliance on the second ground. It is through the intervention of agents that corporations act or contract, who are

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either specially designated by the Act, or appointed by, and derive their authority from, the corporation; and although, generally, the contracts of corporations are under their common seal, the seal is not necessary in accepting bills of exchange, or in issuing promissory notes, by companies incorporated for the purposes of trade. (*Mayor of Ludlow vs. Charlton*, 6 Mees. & Wels. 822.) The rule, however, which requires their common seal to be affixed to the acts and contracts of corporations, has undergone important modifications and changes in the United States. Mr. Justice Story, says, "whatever may be the original correctness of this doctrine as applied to corporations existing by the common law, in respect to which it has evidently been broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal." (*Fletcher vs. United States Bank*, 8 Wheat. 357.) Reviewing the authorities on this subject, Angel & Ames remark, "Upon the same principle, it seems clear that a vote or resolution appointing an agent, need not be entered on the minutes or records of the corporation in order to his due appointment; unless the charter, statute, or by-laws, are not merely directory in this particular, but render it absolutely essential. The vote of appointment, may, therefore, as an appointment of an agent by a natural person, be implied from the permission or acceptance of his services, from the recognition or confirmation of his acts, or, in general, from his being held out as an authorized agent of the corporation." (Ang. & Ames, on Corp. 220, 2d ed.)

But it is not necessary to pursue the inquiry and ascertain the competency of E. C. Leitner, as an agent of the corpora-

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tion, to contract for, and bind it; it is enough that he was when he negotiated the bill, one of the members of the Bivingsville Cotton Manufacturing Company, who are liable as general partners by the express terms of their charter, and in which character they must be regarded in all their contracts with the public. How far then can he bind his associates by his acts and contracts as a partner? One partner has implied authority to bind the firm by contracts relating to the co-partnership, to borrow or pay money, to draw, accept or indorse bills or notes, and the firm will be liable, although the money be mis-applied. (Col. on Part. 848, 356, 365.) His authority to bind his co-partners arises from the nature and objects of the association. C. J. Marshall has very clearly stated this general authority of the partners. "A partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the Company to transact its business in the usual way. If that business is to buy and sell, then the individual buys and sells for the Company, and every person with whom he trades in the way of its business, has a right to consider him as the Company, whoever may compose it. It is usual to buy and sell on credit; and if it be so, the partner who purchases on credit in the name of the firm, must bind the firm. This is a general authority held out to the world, to which the world has a right to trust." (*Winship & al. vs. Bank of United States*, 5 Peters R. 561.) An understanding among the partners to withhold the power to draw or indorse bills by an individual member will nevertheless bind the firm as regards third persons not affected with notice of such under-

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standing. (*Bank of State of South Carolina vs. Case*, 8 Barn. & Cress. 422.)

The competency of E. C. Leitner to negotiate the bill to the plaintiff, is derived from his relation to the members of the Bivingsville Cotton Manufacturing Company, either as a corporator or a general partner. If the former, some evidence, and, perhaps, more than was introduced on the trial, is necessary to render the corporation liable for his contracts; but by the charter under which the defendants transacted business and claimed corporate privileges, the world was authorized to hold E. C. Leitner and George Leitner, responsible, as partners, for the acts or contracts of either, relating to the partnership. Whether the agent act improperly or not, so long as he acts within the scope of his authority, the principal is liable, unless there be fraud on the part of him dealing with the agent.

The evidence offered by the plaintiff, may have satisfied the jury that the bill was negotiated by E. C. Leitner either as an authorized agent of the corporation or in his character as partner, and it is proper that this inquiry should be submitted to the decision of the jury.

The motion to set aside the nonsuit is, therefore, granted by a majority of the Court.

O'NEALL, WARDLAW and MUNRO, JJ., concurred.

Motion granted.

Bank vs. Town Council.

THE BANK OF CHESTER vs. THE TOWN COUNCIL OF CHESTER.

The charter of the Bank of Chester, passed in December, 1852, provides, "that no municipal corporation shall tax the capital stock, or profits of the Bank, without authority first had and obtained from the Legislature." By Act of December, 1853, the Town Council of Chester were authorized to impose a tax on a multitude of subjects, amongst them, "on all stocks of every kind." *Held*, that the Town Council could not impose a tax on the capital stock of the Bank of Chester.

BEFORE WITHERS, J., AT CHESTER, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"The relators moved for a prohibition against the defendants, to restrain them from collecting the sum of \$300, assessed upon the capital stock of the Bank, by way of taxation, by the village corporation, within whose limits the Bank transacts its business.

"I granted the prohibition; and an appeal is taken from the judgment.

"The legislation, upon which the question arises, is to the following effect:

"In December, 1852, it was enacted that the capital stock of the Bank of Chester, (among others,) "should be liable to taxation in the same manner as the capital stock and property of individuals and other corporations; provided, that no municipal corporation shall tax the capital stock or profits of said Banks, without authority first had and obtained from the Legislature."

"In December, 1853, the Town Council of Chester, by an amendatory Act, was empowered to tax a multitude of subjects, touching the present question, in the words following:

"The Town Council of Chester shall have power to impose

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an annual tax on all real estate, all stocks in trade, all stocks of every kind, (railroad and plank-road stocks excepted,) all moneys loaned at interest, all negroes, all carriages, wagons, horses and mules, kept for private use, and on all gold and silver watches, kept for private use, within the corporate limits of the said town.' The Act then provides for a maximum rate of such tax, and the ascertainment of the basis of the rate of collection by three assessors, &c. Further, 'And the said Town Council shall have power to enforce the payment of all taxes and assessments levied by the said Council against the property and persons of defaulters, to the same extent and in the same manner as is provided by law for the collection of the general State taxes.'

"I was led by these considerations:

1. "The exemption of the stocks of the banking corporation is express, and founded on a reason that affects a grave and general policy of the State, to wit, the abandonment of the policy of receiving a bonus for banking privileges and the release of such corporate property from annual taxation; and the substitution therefor of periodical general taxation as in the case of other property taxed; and I thought this consideration aided the view, that the power of a village corporation to tax it, against the proviso of the charter, should be express, and not inferential from general words.

2. "That people, by the exercise of the power claimed, who did not reside in Chester, but in various and distant parts of the earth, none could tell where, would be made tributary to a mere local interest, in exoneration, *pro tanto*, of those who sought and enjoyed the corporate franchises; and such a purpose should not be attributed to the Legislature, unless expressly declared.

3. "That on general principle, a franchise once granted by

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the sovereign, in terms express and unambiguous, should be revoked, annulled, or enervated, only by terms equally express and unambiguous.

4. "That it was doubtful whether the stock, held by various persons in the capital of the Bank of Chester, could be considered as within the corporate limits of the village, merely because they had a house and agent there dealing upon its credit; and hardships might occur upon a stockholder in such Bank who resided in Yorkville, where (if that village had a charter like that of Chester,) his stock might be assessed there, and also in Chester, as well as by the State of South Carolina.

"Such considerations, operating on the instant, induced the granting of the prohibition."

The defendants appealed, on the ground that the defendants, under their amended charter of 1853, have the power to assess the capital stock of the Bank of Chester.

Herndon, Patterson, for appellants.

MAhily, Gaston, contra.

The opinion of the Court was delivered by

WHITNER, J. The order made by the judge on circuit, granting the prohibition, is approved by this Court. The views submitted in the brief, furnish an ample vindication of the order. There is certainly a distinction between the capital stock of the Bank and the shares of individual stockholders, denominated bank stock. Looking to the general scope and object of the Acts in question, what stock did the Legislature contemplate in the power conferred upon the

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Town Council? We should not give such a construction as would subject the same property to be twice charged for the same tax, unless required by express words of the statute, or by necessary implication. 10 Mass. 514. By way of illustration, suppose the stockholders of this Bank all resided within the corporate limits of this town, would it be competent for this municipality to charge the stock when aggregated, with the payment of a tax, and the same stock when separated into shares, with the same tax? First the corporation and then the stockholders. The words, it is said, are large enough to include either, and if so, certainly both, and an ordinance of Council might work this wrong.

The exception is suggestive of the mind of the law maker on this subject, looking, it would seem, to the "stocks of every kind," as owned by individuals, rather than the corporate or capital stock.

Without this exception, it is not to be questioned, the stockholders of railroads and plank-roads residing within the limits of the town, though embarked in a great beneficial public enterprise, and sharing hitherto burthens and losses, instead of profit, would have been equally subject to taxation, and yet it is manifest that neither the corporations themselves nor the capital stock, would have been.

The dates of these enactments have been brought to view, and enter into the consideration whether the Legislature so immediately after the guarantee afforded in the charter against any molestation by municipal corporations, without authority first had and obtained, would have likely conferred the power in question.

I think it clear, that the scheme as gathered from the enumeration of property and persons looked exclusively, as it should have done reasonably, to property and persons within the corporate limits of the town.

But the weightier considerations, and doubtless those

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mainly influencing the judgment of this Court, as already suggested, are to be found in the brief. The motion is refused, and the appeal dismissed.

O'NEALL, WARDLAW, WITHERS, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

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G. W. RICHARDSON ET AL. *vs.* T. C. GOWER.THE SAME *vs.* GOWER, COX & GOWER.

Where the payee and owner of a note payable to bearer died intestate, and his distributees to avoid the expense of an administration, appointed agents to settle the estate, and delivered to them the note, *Held*, that such agents could not sue on the notes in their own names; and that it was immaterial whether there were debts or not.

The mere naked possession of a note payable to bearer does not authorize the party in possession to sue thereon in his own name.

BEFORE WHITNER, J., AT GREENVILLE, FALL TERM,
1856.

In the case first stated, the action was upon a promissory note, for \$91 20, payable to John Richardson, or bearer; and in the second case, the note sued on was also payable to John Richardson, or bearer. It was conceded that John Richardson died the owner of these notes; and that, in December, 1854, his heirs and distributees, in order to avoid the expense of an administration, entered into a written agreement to divide his estate among themselves, and to appoint the plaintiffs their agents to collect debts due the intestate. In pursuance of this agreement the notes sued on were delivered to the plaintiffs.

His Honor held, that plaintiffs were not entitled to sue on the notes, and granted in each case a motion for a non-suit.

The plaintiffs appealed, and now moved this Court to set aside the non-suits.

Townes and Campbell, for appellants.

Elford, contra.

Richardson vs. Gowen.

The opinion of the Court was delivered by

MUNRO, J. The conceded facts of the above cases, are briefly these:

That the notes upon which the actions are founded, belonged to the intestate in his lifetime, and were found among his effects, after his decease; that his widow, and the other distributees of the estate, supposing no debts to be due by the intestate, and with the view of avoiding the expense incident to a regular administration, authorized the plaintiffs to act as their agents, in settling the affairs of the estate.

But apart from the authority that is claimed to be derived from the above mentioned agency, the ground that is mainly relied on to sustain the actions in their own names, is this: that the mere possession of a note payable to bearer, the holder having no interest whatever in it, entitles him to maintain an action in his own name, and that it is not competent for the maker to question his right to recover; and in support of this doctrine, the cases of *Jackson vs. Heath*, 1 Bailey, 355, and *O'Brien vs. Sauls*, 2 Rich. 332, are relied on.

As to the first mentioned case, *Jackson vs. Heath*, it has certainly no application whatever to the case in hand, for there, the notes upon which the action was brought had been delivered by the testator in his lifetime to the plaintiff for the use of an infant grand-daughter; and it was properly held by the Court, that the delivery of the notes to the plaintiff, constituted him a trustee, and therefore the legal owner; and until he had executed his trust by the surrender of the notes to the *cestui que trust*, he had a right to bring an action upon them in his own name.

And it is equally certain that the position contended for derives as little support from the case of *O'Brien vs. Sauls*, for all that was decided in that case was this: that upon a note payable to bearer, a suit may be brought in the name of a party having no interest in it, *for the benefit, and by the direc-*

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tion of the owner; but at the same time it was held to be competent for defendant to impeach the plaintiff's title by showing that its possession had been obtained *mala fide*.

In the present case, there cannot be the slightest pretence for saying, that the plaintiffs are suing for the benefit, and by the direction of the legal owners of the notes; for in no sense of the term, can the distributees be said to be the owners of the effects of an intestate; their rights being merely contingent until the estate has been fully administered. No one can with propriety be said to be the owner of the goods of an intestate, unless it be one who can trace his authority to a regular administration granted by the Ordinary. Were it otherwise, the necessity imposed upon a party suing in his representative capacity, to make proof of his authority, would be senseless and unmeaning.

Whether the estate be indebted or not, is a matter entirely foreign to the consideration of this question; the sole question here, being, whether the plaintiffs, without having obtained letters of administration upon the estate of the intestate, can nevertheless maintain actions for the recovery of debts that were due to him at the time of his death.

No legal proposition is better established than this: that any intermeddling with the effects of an intestate, stamps upon the party the character of a wrong-doer, (I use the term wrong-doer in its strictest legal sense, being the only sense in which it is applicable to these plaintiffs,) and no authority derived from the distributees can legalize the act.

It would be a dangerous precedent to permit any interference with the goods of an intestate, without the sanction of legal authority, under the pretext that the estate was not indebted. In the administration of an estate, the rights of its debtors, are as much under the protection of the law, as are the rights of creditors and distributees. Payment by a debtor of an estate, with a knowledge at the time that a person to whom it is made, is not the legal representative, would

• Richardson vs. Gowen.

be no protection to him, against an action brought by one clothed with legal authority; so neither could a recovery by the present plaintiffs be pleaded in bar to an action brought against these defendants by a lawful administrator.

For the foregoing reasons we are satisfied with the ruling of the Circuit Judge, in granting the non-suits, so that the motions in both cases must be dismissed; and it is so ordered.

O'NEALL, WARDLAW, WITHERS, WHITNER, and GLOVER JJ., concurred.

Motions dismissed.

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**ANDREW BURNSIDE vs. THE UNION STEAM BOAT COMPANY
OF GEORGIA AND SOUTH CAROLINA.**

Action against a common carrier for damage to cotton. J. W. was examined by commission, as a witness for plaintiff. By agreement, he was to share with plaintiff the profits and losses of the shipment, but had assigned and released his interest to plaintiff. When the assignment was produced, the objection to J. W.'s competency was waived, and his testimony was read. When the evidence in the case was closed, the circuit judge declined to rule out J. W.'s testimony, as incompetent:—*Held*, that his ruling was proper.

Where an insurance has been effected on goods shipped, the shipper may maintain an action against the carrier for damage done to the goods, notwithstanding the liability of the insurer to him. Such is not like a case of double insurance; the carrier is primarily liable, and may be sued by the shipper, for the benefit of the insurer, even though the insurer has advanced the amount of damage.

BEFORE WHITNER J., AT EDGEFIELD, SPRING TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

“The defendants were engaged as common carriers in the transportation of merchandize on the Savannah river. December 12, 1852, they received in good condition a lot of cotton belonging to plaintiff, at the wharf in Augusta, designed for shipment to Savannah and executed bills of lading, containing exceptions limiting their liabilities. Seventy-four bales of the cotton were damaged at Augusta, the injury to the cotton being traced to the negligence of defendants, satisfactorily as I thought, and as the jury affirmed by their verdict. The damaged cotton was left in Augusta and the residue taken to Savannah. An insurance had been effected December 11th, with the Columbia Insurance Company on the entire lot, against fire and the usual risks of the river. A survey was held, and a recommendation made that the dam-

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aged cotton should be sold in Augusta for the benefit of all concerned. This was assented to within a few days by the parties, plaintiff, defendants and the Columbia Insurance Company, without prejudice to any. The value of the cotton was shown in the condition delivered, to be from nine to nine and a half cents per pound. The value when damaged as shown by the sales, a fraction over five cents per pound. The proceeds of sale were paid over to plaintiff, and this action was brought to recover the loss and a verdict was had by the plaintiff. John Walker, a principal witness on the part of plaintiff, was examined by commission; an objection was taken to his competency on the score of interest. He declared that he was to share the profits and losses of a shipment, and sale in the Savannah market, originally, but had assigned and released his interest to plaintiff. The assignment was produced and examined by counsel, and the objection waived—a subsequent commission had also issued and the further testimony of this witness was read without objection. The sequel of the case disclosed that an insurance had been effected, and some arrangement made on the subject of losses. When, therefore, on the testimony being closed, defendants' counsel asked that the evidence given by this witness should be withdrawn as incompetent, I declined so to rule, and it was submitted to the jury.

“On the second ground of appeal, it is proper to say that plaintiff's counsel objected to any evidence being heard, and his objection was overruled. I was disappointed that the testimony did not disclose the facts with more precision, as in that event the verdict might still have ended the litigation, though my opinion as to the point raised might be found erroneous. No amount was ascertained as paid by the Columbia Insurance Company on their policy. The agent of the Company proved that a claim had never been made out by plaintiff; that being in a strait for money to meet his draft for the purchase, he made an arrangement with the

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president of the Insurance Company, whereby an advance was had to await the event of the suit then commenced, and which it was understood was to proceed. On this part of the case it is proper further to premise there was an allegation of interference on the part of the Insurance Company, in preventing the removal of the cotton from the lower wharf, in consequence of which the damage was increased, and my instructions were asked as to this point, specifically. I do not understand the ground in either aspect as pointing thereto, and hence, I forbear any explanation further on the case made. I did not think the present recovery should in any way be limited by the additional liability of the Insurance Company, or reduced by any arrangement secured by plaintiff with that Company, or payment made by them. I held the contracts of the insurer and the carrier, to be entirely distinct; that they were not to be regarded in the light of joint contractors or insurers, so as to entitle the defendants to a deduction by way of contribution, much less here, because the policy was anterior in point of time, to the bill of lading. Was the Insurance Company to be regarded primarily, and mainly liable to the exoneration of the defendants in the present suit? on the contrary, if the loss had resulted from the negligence of the defendants, they were liable; that on principles of policy the wrong-doer should not escape, and that the case was the same as though insurers had not paid a farthing—on the authority of cases referred to hastily on circuit, I held that this action could be maintained in the name of the shipper, for the joint benefit of himself and the insurer, or for the benefit of the insurer alone—under the circumstances, I did not think the payment or advance, as the case might be, could inure to the benefit of defendants in part or in whole, in the present proceeding.”

The defendants appealed, and now moved for a new trial, upon the grounds:

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1. The witness John W. Walker, having a direct interest on the side of the plaintiff, in the result of this cause, was incompetent therefore to testify on his behalf.

2. The presiding judge, it is respectfully submitted, erred in his instructions to the jury in the following particulars:

1. In directing them that even though it were proved that the plaintiff had been fully indemnified by the Columbia Insurance Company of South Carolina, for the damage done to his cotton, yet this did not amount in legal contemplation to payment or satisfaction in any wise, or to any extent of the plaintiff's demand in this behalf.

2. In directing the jury that no payment or compensation made by the Columbia Insurance Company to the plaintiff, in respect of the injury done to his cotton, should be taken into the account in estimating the amount of damages sustained by the plaintiff in this behalf.

Carroll, for appellants.

Magrath, contra.

The opinion of the Court was delivered by

WHITNER, J. The witness, whose competency is questioned on the score of interest, by the first ground of appeal, had been examined by commission. On the objection being taken, it appeared, that the witness was to share the profit or loss in the shipment of this cotton then contemplated, in another market, but had executed an assignment and release to the plaintiff, which was produced. The objection was waived and the testimony was read: another commission to take the further testimony of the same witness, was also published

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and read without objection. When the testimony was closed and counsel about proceeding to the argument of the case before the jury, and which, it may be proper to add, was the second day after the testimony had been read, the presiding judge declined to permit or order the evidence of this witness to be withdrawn from the jury. To have sustained the objection renewed at this stage of the case in any point of view of which it is susceptible, would have been embarrassing beyond measure, manifestly unjust to the plaintiff, and, it was not at all unlikely, unavailing to the defendants, inasmuch as it had reached the jury and probably done its work. Such an order, under such circumstances, would have been unprecedented in our practice, for it is to be kept in mind, that the ground on which the objection is still pressed, rests upon the allegation, that inasmuch as losses were to be borne equally, hence the release of plaintiff was indispensable to free the witness from interest. It was not the case, therefore, that sometimes happens, where a witness declares he has no interest, but the examination having proceeded, other facts transpire, whereby the interest becomes then for the first time manifest—at most, it was but the case, not uncommon with the profession, where new and other views were suggested by a right reflection, but unfortunately, when well founded, after the opportunity had passed. The objection, therefore, was too late. But I am permitted by this Court, and it is due to the sleepless vigilance that guarded the interests of these defendants, to add, that, as an original objection it might well have been overruled and the testimony heard. The validity of the assignment and release has not been drawn in question, and it is clear that the very acceptance by the plaintiff, carries with it a corresponding discharge of witness from all liability to any future account. There was no subsisting mutuality in the adventure, and by the assent of each, fairly inferrible, their engagement was ended, and the witness had no interest in the event of this suit.

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The second and third grounds of appeal have led the appellants' counsel to quite an extended discussion, having reference to the relative rights and liabilities of the two companies, these defendants and the Columbia Insurance Company. I do not propose to follow far in this direction, as I think the grounds depend on the just solution of a single proposition. It has been insisted this was the case of double insurance, hence the deduction of the first ground, that being fully indemnified by the Columbia Insurance Company for damage to the cotton, this, in legal contemplation, was a payment and satisfaction of plaintiff's demand, or, as in the other ground, at least entitled the defendants to a *pro rata* deduction; again, if not to be regarded in strict legal parlance in the light of a double insurance, yet in point of fact an insurance had been effected with the Columbia Insurance Company, and the defendants were regarded in law as *insurers*, and hence a payment by the former should operate as a discharge to the latter, it being wrong in morals and in law that one should be twice compensated for the same injury. In point of fact no amount was ascertained to have been paid by the Columbia Insurance Company on their policy: a claim had never been made out by plaintiff. An advance by the President of the Company to this plaintiff to enable him to meet his draft for the purchase of the cotton, to await the event of this very suit, then commenced, was a very different thing from an admitted liability in discharge of which a payment was made.

I scarcely deem it necessary to pursue the matter any further. It is true, on circuit, inferences were sought to be drawn from the fact that some amount of money had passed from the President of the Insurance Company to the plaintiff, and hence the fact was one to be inquired of by the jury, and if found by them, then they were instructed as shown by the report.

There is no ground on which to rest an allegation that this

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was a double insurance, which is said to be where the insured makes two insurances (3 Kent, 280,) on the same risk and the same interest. There were no two policies here, so essential to define and determine the mode of contribution. A doctrine, which, though it applies very equitably in such a case, would lead to very monstrous results if a common carrier who, though he be in the *nature of an insurer*, could thus discharge the consequences of his own negligence by securing a rateable contribution, from all underwriters, on the different policies often effected on goods entrusted to his care. To test the principle, divest the case of any pretence of payment by the Insurance Company in advance, and when suit is brought, and a recovery had of these defendants for the injury to the cotton, occasioned by their negligence, affirmed by the verdict of a jury, on what ground would they place their demand for a rateable contribution towards the loss: for in the case of double insurance, if the insured recovers his whole loss from one set of underwriters, they will be entitled to their action against the other insurers. A statement of the proposition suggests an answer to the entire allegation. In this case the loss was ascertained by the verdict of the jury to have resulted from want of care, skill and diligence, on the part of these defendants, and their liability was inevitable. The principles laid down on the circuit are approved by the Court.

The motion for a new trial is dismissed.

O'NEALL, WARDLAW, WITHERS, GLOVER and MUNRO, JJ. concurred.

Motion dismissed.

Hooks vs. Byrd.

W. HOOKS vs. W. F. BYRD.

Under *feri facias* against B., the sheriff levied on and sold as a whole, the interest of B. in the store of B. & L., co-partners, and his interest was purchased by L. On rule against the sheriff, *held*, that he was not excused from paying over the money to the *feri facias* against B., because some six months before the rule was moved for, he had been notified by one claiming to be a creditor of B. & L., not to apply the fund to the *feri facias* against B., as it would be claimed by the creditors of the firm.

BEFORE GLOVER, J., AT SUMTER, FALL TERM, 1856.

Under the plaintiff's *fi. fa.* the sheriff, Thomas D. Frierson, levied on and sold as a whole, the interest of the defendant in the store of Byrd & Louis. The purchaser was Louis, the co-partner of defendant.

On rule against the sheriff, to show cause why he had not paid over the money, arising from the sale, to the plaintiff, he returned for cause:

"That this respondent received on the 17th May last, written notice from Joseph H. Oppenheim, alleging himself to be a creditor of the firm of Byrd & Louis, and as representing other creditors of said firm, not to pay said funds to the individual debts of W. F. Byrd, but that they would demand that the same should be first applied to the firm debts, which he alleged were larger than the amount of funds in the hands of this respondent,—that this respondent does not know, but does not believe that the said creditors have been satisfied.

"That he also received verbal notice to the same effect, from the said Oppenheim, on the 17th day of August last.

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"The creditors have not served upon this respondent any legal process to make the funds liable, as under their notice."
His Honor discharged the rule, and the plaintiff appealed.

Phillips, for appellant.

Blanding, contra.

The opinion of the Court was delivered by .

WHITNER, J. In the return to the rule, the sheriff states "that the funds in his hands arose from the sale of the goods in store belonging to Byrd & Louis, copartners in trade," and his excuse for declining to pay over the money to the plaintiff, conceded to be the senior execution creditor, is, that he received in May last a written notice from J. H. Oppenheim, alleging himself to be a creditor of the firm of Byrd & Louis, not to pay these funds to the individual debts of W. F. Byrd, and in August last a verbal notice to the same effect. By reference to the proceedings in the sheriff's office, it appears further that *the interest* of Byrd in the store was levied on and sold as a whole, and purchased by the partner, Louis, from whom the money was received.

The rule is, where contests arise between parties claiming a fund in the hands of a sheriff, often a mere stakeholder, in cases of doubt to leave the parties to litigate and determine their rights otherwise than by *rule* against the sheriff. *Dawkins vs. Pearson*, 2 Bail. 619. There is a manifest propriety often in extending this rule so as to include outstanding equities, subject, however, to reasonable limits and restraints. The summary remedy by attachment should be used to enforce the judgment of the Court, in every instance where the refusal of the officer savors at all of contempt. In the case before us, the plaintiff's rights, established by solemn judgment, are opposed by one known to the Court upon his *mere allegation*

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that he is a creditor of the firm. Months have elapsed since his interposition, and to this day he has not thought proper in any formal or solemn manner to verify his superior right. Ample time has been thus afforded him to invoke the aid of a proper tribunal. Vexatious delays and increased expense should not be imposed, and we think that a just regard to the rights of the plaintiff, and the duties of the officer in obeying the mandate of the Court, sanction the coercive remedy sought by the rule against the sheriff. The motion of appellant should, therefore, prevail; and the order on circuit discharging the rule is accordingly rescinded. It is now ordered that the rule against the sheriff, T. D. Frierson, in this case, be made absolute, and that an attachment do issue, unless the moneys in his hands, applicable to the case of this plaintiff, be paid over forthwith.

O'NEALL, WARDLAW, WITHERS, and MUNRO, JJ., concurred.

Motion granted.

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WILLIAM WELCH, Executor, *vs.* J. M. BROOKS and J. H. HUNT.

Upon a question of unsoundness, the complaints of the negro are admissible in evidence, as indications of the seat and nature of the disease. That no physician was called in to attend the negro does not defeat the purchaser's right to recover upon the warranty of soundness.

BEFORE GLOVER, J., AT NEWBERRY, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"The action was assumpsit on a promissory note drawn by the defendants in favor of the plaintiff, as executor of the will of William Welch, for three hundred and forty dollars, and dated the 6th February, 1854. It was admitted, that the defendant Brooks, bought a negro named Cato at the sale of the estate of William Welch, on the 6th of February, 1854, and that this constituted the consideration of the note. A bill of sale was executed by the plaintiff, as executor, by which he warranted the title and also the soundness, "except an affection of the jaw."

"The defence relied upon was, that Cato was unsound, and died of a disease, which was not the result of the affection of the jaw.

Witnesses were permitted to state what Cato said respecting his complaints.

"The jury found for the defendants."

The plaintiff appealed, and now moved this Court for a new trial on the grounds:

1. Because his Honor erred in admitting the declarations of the slave to the witnesses, Allbritton, Buzzard, Glasgow and Slight, and others, without their knowing any thing of his disease except from the negro himself.

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2. Because, there was no evidence to show that the slave died of any disease that had its existence before the sale ; but on the contrary the proof was that the negro died of apoplexy, and not of any pre-existent disease.

3. Because no physician had been called to treat the negro before his death, by the defendant, but as soon as he died a physician was called in to make a *post mortem* examination in search of disease, and that no notice of unsoundness, or of the *post mortem* examination was given to plaintiff although within reach.

Fair, for appellant.

Sullivan, contra.

The opinion of the Court was delivered by

GLOVER, J. The declarations referred to in the first ground of appeal were the complaints of Cato of pain in his breast and head, made to witnesses for several years before his death. Such complaints have always been received as indications of the seat and nature of disease, and the objection to their admission is fully met by the decisions of this Court in the cases of *Graham & Reid*, (10 Vol. MSS. 601, Nov. Term, 1853,) and *Enicks vs. Stansell*, (11 Vol. MSS. 49, May Term, 1855.) In the former case, the complaints of the slave of pain in his breast and back made to several persons for upwards of eight years, were admitted, and O'Neill, J., dismissing the appellant's motion for a new trial on the same ground taken in this case, says, "The declarations or rather complaints of the negro were received as the means of ascertaining the seat of the disease. They were in this point of view clearly admissible. In the case of *Young vs. Gray*, (Harp. 38,) it was so ruled ; so too in *Hunter vs. McClintock* (Dud. 327.)"

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In *Enicks vs. Stansell*, the presiding Judge had refused to admit the complaints of the slave, because the attending physician, who was present, was permitted to give in evidence the symptoms and declarations. Withers, J., delivering the opinion of the Court and reversing the decision of the Circuit Judge, says, "It is a point in the law of evidence, which grows out of the first question, and that is referred to this Court. It is, whether an attending physician having been heard as to the symptoms of the disease which afflicted the negro and became the cause of her death, the patient's declarations to another person, before the physician saw her, and very soon after the beating, in relation to her feelings (for she was pregnant and an abortion ensued), ought to have been received for the plaintiff.

"Our cases do establish, that when a sick negro exhibits by complaints in words, or by actions, the nature, location or symptoms of a malady and the existence and effects of such malady are thereby detected and made known, through the medium of other testimony, such complaints or actions of a patient, though a slave, should be heard—availing nothing, however, if they do not serve to point out or throw light upon the existence, nature or effects of a malady—or upon the question in issue, whatever form it may assume. (Vide *Gray ads. Young*, Harper 38; *McClintock ads. Hunter*, Dudley 327.) Such evidence has been received in our Courts upon the grounds, that it was the drapery surrounding the truth—that it was part of the *res gestæ*—that it was of necessity receivable. This doctrine receives support from the case of *Aveson vs. Lord Kinnaird and others*, (6 East, 188); and from the text of Mr. Greenleaf, Vol. 1, on Ev. sec. 102, where this is said, 'So also the representation by a sick person, of the nature, symptoms and effects of a malady under which he is laboring at the time, are received as *original* evidence.'

"Whether the declarations of the negro, offered and excluded on circuit, were of the description which are held admissible

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we do not know, for they were not specified. The exclusion was on the ground, that the symptoms, nature and effects of the malady which destroyed the negro, were disclosed by an attending physician: and this was supposed to supersede any disclosure of the seat of pain, nature of malady, and so forth, to be derived from indications arising from complaints made before the doctor saw the negro, and to one not a physician. If such evidence be original, it does not become secondary because the channel of it is not a physician. In the same section Mr. Greenleaf says, 'If made to a medical attendant, they are of greater weight as evidence; but if made to any other person, they are not on that account rejected.' And to such effect was the case above cited from 6 East. We do not find any thing in our reports which confines the channel of such testimony to a physician. Nor is there any thing in principle that should have such effect. It may become necessary to correct the erroneous and wilfully false representations, the forgetfulness or inadvertence of a medical attendant. In many cases there may be no physician called. Not the grade but the weight of the evidence is affected by the source from which it may be derived. The evidence, of itself, is of no avail—it becomes so only when pointed, verified and applied by other proof."

These cases fully sustain the decision on circuit admitting the complaints of the slave in evidence, and the jury has answered, by their verdict, the question submitted by the second ground of appeal.

It is also insisted, in support of the motion for a new trial, that no physician was called to treat the negro before his death. Both humanity and interest prompt the owners of slaves to provide medical aid for them in sickness, and we believe that this duty is seldom omitted. Where the disease, of which a slave dies, existed at the time of the purchase, the right to recover, for a failure of the consideration, is not defeated because a physician was not called to examine and

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prescribe for him. Whether from such neglect, or from the injudicious application of remedies, a disease proves mortal which, otherwise, might have been under the control of medical treatment, is always entitled to great consideration. In this case Cato died within a few weeks after the sale, and there was no evidence, that the failure of Brooks to procure the attendance of a physician was from neglect, or that the symptoms had become so aggravated that a prudent and humane owner would not have omitted the discharge of a duty incumbent upon all. The examination after death, to ascertain the seat and nature of the disease was proper, and it was not indispensable that notice of that or of the unsoundness should have been given to the vendor.

On neither ground, therefore, can the plaintiff's motion for a new trial be granted.

Motion dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER, and MUNRO, JJ., concurred.

Motion dismissed.

O'Hanlon vs. Myers.

JAMES O'HANLON, vs. WILLIAMS M. MYERS.

To charge one with the intemperate use of spirituous liquors, is not actionable, *per se*.

It will not be presumed from the title, which alone has been preserved, of the Act of 1682, for the suppression of drunkenness, that the Act is of force, and that offenders under it are liable to indictment and punishment.

The Act of 1691, (2 Stat. 68) "for the better observance of the Lord's Day, commonly called Sunday," which provides amongst other things, for the punishment of drunkenness, is not of force.

Act of the Legislature declared obsolete and inoperative, from non-user.

To charge one with having burnt, destroyed and suppressed a will, is not actionable, *per se*.

To burn, destroy or suppress a will, is not an indictable offence.

BEFORE GLOVER, J., AT RICHLAND, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows :

"The declaration was in slander, and contained nine counts, all of which were abandoned except four. The second and seventh counts embrace the charge of intemperance in the use of spirituous liquors ; the second alleging that the defendant had said " O'Hanlon is always drunk," and the seventh, "that he is addicted to drunkenness—his largest expense is for liquors—he takes a tumbler full at a drink, and a half of a gallon of brandy a day." The words alleged to have been spoken by the defendant in the first and sixth counts, charge the plaintiff with destroying the will of the late David Myers. In the first, it is alleged that the defendant said "He burnt, and destroyed and suppressed a certain will of my father, David Myers, which will gave to me a large amount of property;" and in the sixth—"He destroyed a will of my father, which gave to me a large share of his estate, and a part of the property he now owns."

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"The proof was, that David Myers, left of force, a will, dated 26th June, 1833, and a codicil thereto, dated 23d July, 1834, which were admitted to probate on the 9th of March, 1835, on which day the plaintiff and David Myers were qualified as executors; and that no one has ever applied for a citation to revoke the probate. No citation has ever been issued requiring the plaintiff to produce before the Ordinary for probate any other last will of David Myers, nor have any proceedings been had in the Court of Ordinary for that purpose.

"To Gen. Hopkins and others the defendant said, that his mother, in her last illness, in 1854, informed him, that the plaintiff and David Myers, jr., told her, that they had burned a will, on the day of David Myers', sen., death, which was not signed.

"He also said, that Mr. Petigru informed him, that he had drawn a will for his father just before his death, and thought it was executed; but did not know the contents, and it was his (defendant's) opinion, that that was the will which David and the plaintiff had burnt.

"There was evidence that the defendant had charged the plaintiff with the intemperate use of spirituous liquors.

"For the purposes of this appeal, it is not necessary to recite any more of the evidence which was voluminous.

"After the argument had closed and the presiding Judge had charged the jury that none of the words alleged to have been spoken were defamatory and that the action could not be maintained, the plaintiff consented to a non-suit with leave to move to set it aside. If, therefore, the words alleged to have been spoken in either of these four counts be actionable, *per se*, the motion to set aside the non-suit should be granted."

The plaintiff appealed and now moved this Court to set aside the non-suit on the grounds:

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1. Because his Honor erred in holding, that the matters set forth in the 2d and 7th counts of the declaration, in relation to drunkenness, are not actionable.

2. Because his Honor erred in holding, that the matters set forth in the 1st and 6th counts of the declaration, in relation to the burning of the will, are not actionable: Whereas, it is submitted, that the matters so set forth, are, under the circumstances, *as proved*, actionable—and it is submitted, that matters sufficient to go to the jury *are set forth and were proved*.

Bellinger, Bauskett, for appellant.

De Saussure, Gregg, contra.

The opinion of the Court was delivered by

GLOVER, J. If the words charged in either of these counts be actionable without proof of special damage, it must be because they impute to the plaintiff a crime involving moral turpitude, or subject him to infamous punishment.

In support of the counts which allege the publication of words charging the intemperate use of spirituous liquors, we have been referred to statutes passed very soon after the establishment of the proprietary government. The only Acts that provide for the suppression and punishment of drunkenness are those of 1682 and 1691. The title alone of the former has been preserved by Chief Justice Trott, (Trott's Laws of S. C., p. 1, No. 2; 2 St. p. V,) and having expired by its own limitation like many temporary laws of that period, it was revived in 1685; (Trott's Laws of S. C., p. 7, No. 28; 2 St. 13,) but as early as 1736, it was considered inoperative and was then, with several others, declared obsolete. We are not otherwise informed, except by the title of this Act, what provisions were made "for the suppression of idle, drunken and

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swearing persons," and we will not presume from the title alone that such an Act is of force and that offenders under it are liable to indictment and punishment.

The Act of 1691 (2 Stat. 68,) "for the better observance of the Lord's Day, commonly called Sunday," provides, that "whereas the odious, and loathsome sin of drunkenness hath of late grown into common use within this Province, being the root and foundation of many other enormous sins. Be it therefore enacted, that all and every person and persons that shall after the ratification of this Act be drunk, shall forfeit the sum of five shillings for every such offence." It is also provided, that on conviction before a justice of the peace, he shall issue his warrant and levy the forfeiture by way of distress or sale of the goods of the offender; and in default of such distress, &c., that then the party offending do sit publicly in the stocks for the space of two hours.

If the loathsome sin of drunkenness does not involve moral turpitude, it must be conceded that the punishment is infamous, and that to charge one with an offence punishable publicly by the stocks would be defamatory.

Many reasons, however, are suggested which satisfy the court that this Act is not now of force. Trott, C. J., in his compilation of the Laws of S. C., in 1786, declares that it was then obsolete; and neither Judge Grimke nor Dr. Cooper, who have generally adopted his classification at this early period of our judicial history, regard any of the colonial statutes of force prior to 1694. We would hesitate, even with some authority to sustain us, before we declared an Act found on our statute book obsolete from desuetude. But when that declaration has been made more than a century by an eminent jurist and the earliest compiler of our statute law, we may safely adopt his conclusion, especially in reference to the provisions of an Act so inapplicable at the present day. The Act is not only inoperative from non-user, but the offender could not now be punished in the manner provided. The crim-

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inal jurisdiction of magistrates is limited to the trial of slaves and free persons of color, and under our present constitution and laws he is clothed with no power to try a free white man for crimes punished publicly by the stocks.

The aid of such a statutory provision, if inoperative, would long since have been invoked by the zealous and active friends of temperance who have been so laudably engaged in the suppression of the "odious and loathsome sin of drunkenness."

We are, therefore, of opinion, that drunkenness is not a crime indictable in the temporal courts of this State, and, consequently, that the plaintiff cannot recover on the second and seventh counts.

He has with more confidence relied upon the defamatory import of the words alleged in the first and sixth counts, which charge, that he burnt, destroyed and suppressed the will of David Myers. Admitting that such a charge is scandalous, it must also be shown, that to burn, destroy and suppress a will is an indictable offence. No case can be found in which it has been so held by the common law. To accuse another of having secreted a will for the purpose of defrauding his relations, is mentioned by Mr. Starkie in that class of accusations which impute a breach of morality, and of which the law does not take cognizance. (1 Stark. on Slan. 22.)

It has been contended in argument, that as a conspiracy to destroy a will with an intent to defeat the devise is an indictable offence, it follows that to destroy a will with the like intent is also indictable. The principle decided in the case of the *State vs. Dewitt & Watts*, (2 Hill, 282,) does not warrant such a conclusion. This, like the case of *R. vs. McDaniel*, (1 Leach, 45,) rests for support on the ground, that such conspiracies tend to obstruct the course of justice. Two or more may conspire to commit, not only felonies and misdemeanors, but also to do an act the commission of which by an individual would not be indictable. A combination to seduce a

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young woman, and even a concerted disapprobation of a performer, or piece, at a theatre, are cases in which the object may not be the ground of an indictment. The offence consists in the illegal means employed to accomplish an object which, in itself, would not be indictable.

By the common law, larceny could not be committed of written instruments, whether they related to the realty or concerned choses in action, and to remedy this defect, the statute 7 & 8 Geo. IV. c. 29, was passed, which, by the 22d sec. enacts, that if any person shall steal, or, for any fraudulent purpose, shall destroy or conceal any will, codicil or other testamentary instrument, &c., every such offender shall be guilty of a misdemeanor, &c. (2 Russ. on Crimes, 142.)

The only changes of the common law in our legislation will be found in the Acts of 1789, (5 Stat. 508,) and 1839, (11 Stat. 43.) As the latter Act embraces substantially all the provisions of the former, and enlarges the remedy, it is only necessary to ascertain if the 16th sec. of the Act of 1839 punishes by indictment any person who shall burn, destroy, or suppress a last will and testament. This section is in the following words: "If any person, having in possession the will of a deceased person, shall neglect to produce the same to be proved, the Ordinary in whose office such will ought to be proved shall have power to issue against him process as for a contempt, and to imprison him until the will be delivered up; and, upon his continued refusal, he shall be liable to indictment, and upon conviction shall be punished as for a high misdemeanor."

The manifest object of these enactments is to compel the production of wills for probate, and large powers are conferred upon the Ordinary for that purpose. It is not declared to be a misdemeanor to burn, destroy and suppress a will, which are the words alleged in the first count of the indictment; but it is upon the continued refusal of any person

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having the possession of a will, to produce it, after citation, that he is liable to indictment.

The offence, under the Stat. of Geo. IV. consists in stealing, destroying and concealing a will, whereas the liability to indictment for a high misdemeanor under the Act of 1839, is upon the continued refusal to produce it for probate. (*State vs. Pace*, 9 Rich. 355.) A power to imprison is conferred upon the Ordinary, to purge the contempt in neglecting to produce the will, and is no part of the punishment which would follow a conviction for a continued refusal to produce it, and in which alone consists the misdemeanor.

In none of the words in these several counts do we perceive any offence charged which is punished in a temporal court of criminal jurisdiction and which is *per se* actionable.

This conclusion renders it unnecessary to consider the motion to reverse the decision of the presiding Judge on the several other points made on circuit and renewed in this Court.

The motion to set aside the non-suit is, therefore, dismissed.

O'NEALL, WITHERS, WHITNER, and MUNRO, JJ., concurred.

Motion dismissed.

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C. MONTAGUE *vs.* JESSE E. DENT.

Under a sale to foreclose a mortgage, C. M. became the purchaser of a house and lot, and a few days afterwards the sheriff under executions against the mortgagor removed and sold certain gas chandeliers and a pendant gas burner, which were attached by screws to a small pipe, (that conveyed gas into the house) and which could be detached without any escape of gas or injury to the pipe, or any part of the building: —*Held*, that as between C. M. and the sheriff, the chandeliers and gas burner were not fixtures, which passed to C. M., as purchaser, under the sale to foreclose the mortgage.

BEFORE GLOVER, J., AT RICHLAND, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

“At a sale made by the Commissioner in Equity on the 1st October, 1855, to foreclose a mortgage, a house and lot, then occupied by the mortgagor, P. H. Hammerskold, were sold and purchased by the plaintiff. On the 3d of October, 1855, the defendant, then being the sheriff of Richland District, sold the household furniture of P. H. Hammerskold, under executions against him in favor of Boatwright and others; and among other articles sold were several gas chandeliers and a pendant hall gas burner.

“Hammerskold continued in the house until the 3d of October, and the deed from the Commissioner was delivered to the plaintiff on the 9th of October.

“The plaintiff’s action was trespass *quare clausum fregit*, and the trespass consisted in the sale and removal of the gas chandeliers and pendant hall gas burner.

“The plaintiff having closed his evidence a motion was submitted for a non-suit on the following grounds:

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"1. Because on the 3d of October, when the defendant sold the furniture, the plaintiff had neither title to, nor possession of, the house.

"2. Because the gas chandeliers and gas hall burner were not fixtures and did not pass with the freehold.

"Both the chandeliers and pendant gas burner were attached to the small pipes which convey the gas through the house, by screws, and can be detached without an escape of the gas, if a valve be closed above the point where they are screwed.

"It appeared to me that these articles were not fixtures and did not pass with the house to the plaintiff, and on this ground the motion was granted.

The plaintiff appealed, and now moved this Court to set aside the non-suit, on the grounds :

1. That his Honor erred in holding that the plaintiff, could not maintain trespass *quare clausum fregit*, for an entry on premises of which he was in actual possession after purchase at the Commissioner's sale, and to which he received titles dated prior to the trespass, though delivered eight days afterwards.

2. That his Honor erred in holding that burners and chandeliers are not fixtures, though attached by the gas pipes to conduits, leading under ground from the gas house, and though necessary to the use of the said conduits and gas pipes, and though useless unless so attached, and though contributing greatly to the value and enjoyment of the dwelling house, to and into which the said gas pipes (to which the said burner and chandeliers are so necessarily attached) penetrated,

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and from which the said gas pipes could not be separated without injury to the freehold.

Bellinger, for appellant.

Tradewell, contra.

The opinion of the Court was delivered by

WITHERS, J. The question is whether certain gas chandeliers and a pendant gas burner, attached by screws to a small pipe, (that conveyed gas into the dwelling house,) and which could be detached without any escape of gas, or injury to the pipe or any part of the building, passed by a conveyance of the freehold, sold under a mortgage by the Commissioner in Equity, as between the purchaser of the premises and the sheriff who represented the execution creditors of the mortgagor.

So various are the considerations which enter into the interpretation of the law of fixtures, dictating varying and opposite conclusions as to the same or like articles, which may become the subject of controversy, that an adjudicated case may fail to be any authority, where the subject matter of contest may be the same, as the particular case must be considered with reference to the relation of parties, as whether they be landlord and tenant; heir, devisee or reversioner, and executor of deceased tenant; vendor and vendee; manufacturer, artizan, agriculturist, farmer, and so forth. So likewise have the cases in the books adverted even to such considerations as custom, intention, ornament, convenience, and so forth. In *Buckland vs. Butterfield*, 9 E. C. L. R. Dallas, C. J., said, "few decisions can be considered absolute authorities in other instances, even of fixtures of a similar denomination. Every case of the sort must depend upon its own special and peculiar circumstances." In our own deci-

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sions, as well as those of English Courts, the rule upon this subject laid down for heir and executor, is allowed to apply to vendor and vendee; mortgagor and mortgagee; and (say A. & Fer. on Fixtures, p. 114, (m. 152,) "there appears to be more uncertainty in the doctrine of fixtures, as it applies to the case of heir and executor, than to that of any other class of persons." In early times, the executor contended with the heir at disadvantage, and such was the temper of the Courts so late as the time of Bacon's Abridgment. The rigor applied to the executor has been relaxed, however, but still, perhaps, mainly upon that clear modern rule which favors a tradesman and his representative.

The elementary idea is, that the article claimed as part of the freehold must be in some way, fixed in the soil or part and parcel of that which is. "*Solo infixum*" are the words of Lord Brougham, in *Fisher vs. Dixon*, before the House of Lords; Vide, A. & Fer. p. 168, marg. Now the articles embraced by this case seem to want this necessary condition to make them fixtures. The ease or difficulty with which an article may be detached may not be a satisfactory criterion, and it is not; but the effect of its detachment upon itself or some portion of what is the realty or part and parcel of it, is a matter that enters into the question. As to this consideration the defendant has the advantage in the present case, for admitting the gas pipe to be part of the realty purchased, the removal of the chandeliers and the pendant gas burner did not disorder that pipe, did not mutilate it as a conduit, did not diminish or waste any gas, nor were the articles detached less perfect. Then these chandeliers, &c., were not necessary to the enjoyment of the freehold, for the use of the gas itself does not deserve to rank in that category. It is much more matter of convenience than of necessity, or even serious importance. *A fortiori*, may this be said of the mere terminating joints, as it were, of the gas pipe; things including the exercise of taste and ornament; withdrawn and replaced at

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pleasure; substituted by others affording more or less light, as economy or the reverse, or convenience, may dictate. Surely such a case as this cannot stand upon the foundation that supports the case of the *Salt-pans*, upon an estate devoted to salt-making by the owner, (*Lawton, Exor. vs. Salmon*, 1 H. Blac. 260, notes) and our case as to a *Cotton Gin*, (*Fairis vs. Walker*, 1 Bail. 540;) in both which cases (which are only examples of many others,) the controlling idea was, that the full and free enjoyment of freehold conveyed, and destined to definite uses, implied the necessary use of the articles then in question, and their great importance to the obvious purposes of a purchaser.

It will be found by examination of English cases, all of them not between landlord and tenant, that the courts have sanctioned the removal of hangings, tapestry, pier-glasses, nailed to the walls or pannels of the house; and Lord Hardwicke introduced into the class of removable articles even ornamental chimney-pieces, and wooden cornices were classed with them. So also marble-slabs, window-blinds, wainscot fixed to the walls by screws, and the like; premising always, that the articles were not part of the fabric of the house, and the removal would not materially impair the freehold; for such consequences would prohibit the removal of even ornamental structures: Vide, A. & Fer. App. 341, marg. It is probable that such rules would be much restricted in our times; and they have been shaken, to some extent, in England; for, every where, the question must be affected by the great changes which occur in the manner of using the domicile, and (as has been already said) custom has not been excluded from consideration.

We think that in England the rule applied to heir and executor would permit the removal by vendor, or sale by sheriff on execution against him, of the articles now in question. That rule, we may remember, has been attended, if not generated, by a maxim of jurisprudence more English than

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American, to wit, that in questions between heir and executor, the heir and the real estate are to be preferred; and further, that the inheritance shall never be suffered to descend to the heir prejudiced or imperfect. Our dealings with real estate, in this jurisdiction, have very much eviscerated the strength of such maxims, and with us the interest of the heir and the executor is much less in conflict, if it be not identical.

We forbear a discussion and decision upon the right of the plaintiff to maintain trespass; for the facts in relation to his possession are not clear and the law, upon the point considered is such as to enable and require us to adjudge that the motion be dismissed; and it is ordered accordingly.

O'NEALL, WARDLAW, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

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LOUISA F. WORTHY *vs.* THE ADMINISTRATORS OF CHALK.THE SAME *vs.* HERNDON CHALK.

A motion to consolidate is addressed to the discretion of the Court, and should properly be made after declaration and before plea, though if the causes of action are admitted, or certainly ascertained by affidavits, it may be made, it seems, at the return term of the writ.

BEFORE WITHERS, J., AT CHESTER, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows :

"Ten writs in covenant have been issued in the first case stated ; five in the other. The motion was to consolidate the writs, in the respective cases, because they were between the same parties. I enquired into the causes of action ; the reply was, that they were covenants to pay money for the hire of negroes, of different dates, payable at different times, with different sureties—with stipulations that the hirer should pay taxes, physician's bill, &c. The plaintiff's attorneys said they had no objection to consolidate, except, that no defence might exist as to some of the notes, or there might be as many kinds of defence as there were cases, and when all were combined in one declaration, the absence of a witness for the defence, as to a single note, might operate to postpone the plaintiff as to the whole. If this had been the issue term, and the pleas had been in, I could have seen a much clearer course for the exercise of a just discretion, than as matters now stand.

"Nevertheless I offered to grant to the respective defendants a motion to consolidate henceforth all such cases as to

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which they might file the same pleas or defences: (all pleas in covenant being special;) but they declined such motion; and I refused that which they presented, to wit: for an absolute and universal consolidation."

The defendants appealed.

Thompson, for appellant, cited 2 N. & McC. 440; 3 Chit. Gen. Pr., 644; 1 Sel. Pr. 237.

McAulley, contra, cited 2 Imp. Pr. 731; 1 Sel. Pr. 237; 1 N. & McC. 413; 2 Stra. 1178, 1149; 9 Johns. R. 262; 1 Paige R. 614; 2 T. R. 639.

The opinion of the Court was delivered by

O'NEALL, J. I agree to what is said by Judge Huger in *Planters' & Mechanics' Bank vs. Cohen*, 2 N. & McC. 440, a, that "a motion for an order to consolidate is an application to the discretion of the Court. When satisfied that no injury will result, the Court will always grant the motion." These remarks must be understood in reference to the case; it appeared in it, that separate actions had been brought upon five several promissory notes made by the defendant and payable to the same person, and by him endorsed to the plaintiff.

This rule has been uniformly followed. In England, whence our practice is derived, it appears, that in the King's Bench, what is called a consolidation rule was introduced by Lord Mansfield staying the proceedings in all the actions upon the same cause except one. 1 Tidd's Prac. 614. The same author, 615, tells us that "in the Common Pleas there is no rule of Court, but a judge's order is obtained, for consolidating actions."

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• In 3 Chitty's General Practice, Chap. 28, § 27, p. 642, the matter is thus stated: between the declaration and plea, "are usually made applications to consolidate several actions or demands into one, when the same plaintiff having several claims against the same defendant all complete at the same time, *or at least before he has issued any writ, vexatiously or unnecessarily* commences several actions upon several bills of exchange or promissory notes, or for several trespasses." "In these cases the Court or Judge," as Mr. Chitty tells us, "will compel the plaintiff however reluctant to consolidate, and include the whole in one declaration, and pay the costs of the application." These authorities point us I think to the true course of our practice, and to the decision of these cases. Beyond all doubt, until the declaration, in the general jurisdiction, is filed, there are no means of knowing the precise causes of action against the will of the plaintiff, and therefore a motion to consolidate is proper between the declaration and plea. But if the causes of action are admitted, or ascertained *certainly* by affidavits, I have no doubt a judge may make the order to consolidate at the return term of the writ. Such has been our practice, and *it saves costs*. Consolidation ought always to take place when the actions are upon notes or bills of exchange, made or drawn by the defendant, payable to or endorsed to the plaintiff, and due when his writ issued. The same rule holds as to debt or covenant on other causes of action. This is what is meant by Impey, at 731, where he speaks of notes due at different times, and actions successively brought. The plaintiff there sued as each note fell due, and of course he could not be compelled to consolidate such actions. These remarks sufficiently indicate the course of practice. We cannot undertake to say that the discretion of the judge in these cases was improperly exercised: and as the parties at the filing of the declarations

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before plea pleaded can make the motions to consolidate, this Court will not *now* interfere.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion refused.

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THE STATE *vs.* WILLIAM B. PORTER, ET AL.

Indictment for hog stealing charged, that the offence was committed in January, 1851. General issue pleaded, and evidence offered, that the offence was committed in January, 1856:—*Held*, that such evidence was receivable; that it was not necessary to prove the time, as laid, and that the prosecution was not barred by the statute of limitations.

BEFORE WITHERS, J., AT UNION, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

“The defendants were indicted for stealing a sow, the property of one Randolph Jenkins.

“When the owner of the sow stated he had lost her, and she was taken on the 8th of January, 1856, the defendants’ counsel objected to the evidence, and to any evidence of a larceny that occurred after the time laid in the indictment, which I then learned was some time in 1851, and (it was said) that larceny was barred by the statute, as appeared on the face of the indictment. It is obvious to observe that the face of the indictment does not show that the larceny therein charged, as committed in 1851, was barred, because for aught derived from the indictment that larceny may have been committed within six months of a warrant issued for it, and if a warrant had been issued for a larceny committed in 1850, and within six months of the commission of the offence, it would not be barred, (if barred it can be at all) though the bill of indictment should be found so long after as 1856. The warrant is the beginning of a prosecution, not the presentment of the grand jury.

“The real point was, and is, whether evidence of hog-stealing, committed at a time subsequent to that stated in the

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indictment, but anterior to the finding of it, and prosecuted within a few days after its commission (*i. e.* warrant issued) could be received. I held that it could, because the time alleged in the indictment was immaterial.

“Whether the bar to the collection of penalties and forfeitures, after the expiration of more than six months before prosecution is begun, applies to the offence of hog-stealing, I have not decided, nor have I passed upon the matter in arrest of judgment, except in the form and in the manner above stated.

“As to the evidence (supposing it credible as the verdict of the jury shows it was) it was quite sufficient to establish that these defendants, being out hunting rabbits on the evening of the 8th January, 1856, when snow was upon the ground, about an hour before sundown, set the dogs on a sow found in a field, near Jenkins’ the prosecutor; enclosed, but a gap down in the fence; that they captured the sow; that she was in the mark of Jenkins; that a wagon was procured, near at hand, and the sow hauled to one Mrs. Bentley’s, (who was connected with one or more of the defendants) getting there about dark; that the sow was there butchered, the ears cut off close, (because they were so much torn by the dogs as to be of no use, said William B. Porter,) that next morning Jenkins met William B. Porter carrying home the wagon that had been used in hauling off the sow; asked him if he had not killed a hog the evening before; he admitted it; Jenkins said he believed it was his property, and would like to see it; Porter told him he could do so at Mrs. Bentley’s; he and another went and saw a carcass there, answering the description of his sow, (and there is no ground to doubt it was his) nor was there any evidence to show any excuse for Porter, or either of the others, running down and carrying off that sow and butchering her for use.

“Two witnesses on the part of the State, (the defence called none) one of whom was W. B. Porter’s brother-in-law, testified

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to his reputation for honesty before this transaction. Nothing was said as to the character of the other defendants.

"The jury rendered a verdict of guilty as to all."

The defendants appealed, and now moved this Court in arrest of judgment, or for a new trial, on the grounds,

In arrest of judgment:

1. Because the indictment, on its face, showed the offence charged was clearly barred by the statute of limitations, being for hog-stealing in January, 1851, and the indictment was not found until March term, 1856.

2. Because the indictment is defective, null and void in law.

For a new trial:

1. Because the defendants were taken by surprise in the course taken, and declined to call witnesses when it appeared there was no offence proved against them for which they were liable to legal punishment.

2. Because his Honor failed to charge the jury as to the legal effect of the charge being laid in the indictment in 1851, and the proof being that it was in 1856, in which it is respectfully submitted, there was an error of omission.

3. Because the good character of the defendants, under the evidence in the cause, entitled the defendants to a verdict of acquittal.

Thomson, for appellant.

Dawkins, solicitor, contra.

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The opinion of the Court was delivered by

O'NEALL, J. I suppose after the case of *The State vs. Youngblood*, 2 McC. 241, it must be held that the statute of limitations (six months) applies to the offence of hog-stealing. If, however, it were *res integra*, I should hesitate much about so deciding.

In this case it cannot help the prisoners. It is possible that by pleading it *specially* to the indictment, it might have been difficult for the State to have avoided the bar.

But pleading the general issue, and going to trial, made the case one which turned upon the facts, and when it was shown that the offence was committed 8th January, 1856, there was no ground for the statute, and the whole case was resolved into the question whether the proof was receivable, as the indictment laid the offence on the 8th January, 1851.

There can be no plainer proposition in law, than that "it is in no case necessary to prove the precise day or even year laid in the indictment, except when the time enters into the nature of the offence." 1 C. C. L. 224. It is plain that here time has nothing to do with the nature of the offence.

The other grounds in the case require no comment.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, MUNRO, and GLOVER, JJ., concurred.

Motion dismissed.

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S. & J. FANT vs. A. L. & M. WEST.

Action against both partners, on a single bill executed by one partner in the name of the firm :—*Held*, that it was admissible to show the consideration of the single bill and the course of dealing of the partners, in reference to other single bills, in order to raise the inference, that authority to execute the bill sued on had been given.

BEFORE WHITNER, J., AT UNION, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of debt, on a single bill, payable to plaintiffs, for eighty-two dollars and eighteen cents, at one day, bearing date 1st January, 1855, executed in the name of A. L. & M. West. The defendants were partners, doing business at West's Springs, in Union District. The first named member of the firm principally conducting the business; the other member residing in one of the lower Districts, but occasionally at the Springs, and employed in the partnership affairs. This was a sealed instrument executed by A. L. West, the consideration of which I think I may say was satisfactorily shown to be for groceries purchased for the firm. Notwithstanding the objection of counsel, I admitted the following testimony in reference to the course of dealing of these partners: that in the liquidation of their accounts, notes under seal had been frequently given; on one executed by A. L. West, suit had been brought—a recovery had, no defence being set up, and payment of the judgment by M. West; another note of like kind had been executed by A. L. West, and had been paid off, each of the partners making payments without objection to the form of the obligation. Another note under seal, executed by the same party had been paid in part by the other member without any objection

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made to the character of the instrument. Other notes were in existence, but in no instance was it in proof that any had been executed by M. West in person, or by his express authority.

"In submitting the case to the jury they were instructed that one partner could not bind his co-partner by an obligation under seal, without authority from such partner. That unless the proof satisfied them such authority had been given, covering this transaction, the defendant, M. West was not answerable, at least in the present action. That in the absence of direct proof of authority it might be inferred in some instances from the course of dealings, and the conduct of the partners themselves, and to this end, in this particular case committed to the jury the proof adduced.

"They returned a verdict for plaintiffs."

The defendant, Moses West, appealed and now renewed his motion for a non-suit in this Court on the grounds:

1. Because his Honor should have granted the motion for a non-suit, which was made on the circuit in this case.

2. Because the note sued on was null and void in law.

And failing in that motion then he moved for a new trial, on the ground:

Because his Honor admitted illegal and incompetent evidence in the case, that is evidence to show what was the consideration of the note sued on, when from the state of the pleadings in the case, such evidence was not admissible, the action being on the sealed note, and no allegations whatever in the declaration as to the consideration of the note or the account for which the note had been given.

Thomson, for motion.

Arthur, contra.

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The opinion of the Court was delivered by

WARDLAW, J. The single bill was not void, but, if executed by one partner with sufficient authority from the other, bound both. The validity then depended upon evidence to be judged of by the jury; and in this case, we can only repeat what was said by Judge Nott, in the case of *Sanders vs. Hughes*, cited by Judge O'Neill in *Flemming vs. Dunbar*, 2 Hill, 533. "The evidence may have authorized an inference that such authority had been given, and that was a question for the jury."

The consideration of the single bill, beneficial to both partners, and the course of dealing shown by their conduct in reference to other such bills, were circumstances proper for the consideration of the jury, pertinent to the question which they were to resolve, and admissible under the issue made as to the joint execution of the instrument sued on.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

State vs. Kennerly.

THE STATE vs. SAMUEL J. KENNERLY.

Where an indictment sufficiently charges a common law perjury, its conclusion, *contra formam statuti*, may be rejected as surplusage.

By the common law the oath must be material or it will not amount to perjury; and the rule is the same, it seems, under the Act of 1833.

Where the indictment alleges the oath to have been material, the materiality must be proved.

BEFORE GLOVER, J., AT RICHLAND, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows :

"The defendant was indicted for perjury under the Act of 1833, (6 Stat. 485,) which provides, "If any person shall wilfully and knowingly swear falsely, in taking any oath now, or at any time hereafter, required by law and administered by any person directed or permitted by law to administer such oath, he shall be deemed guilty of perjury, and on conviction, incur the pains and penalties of that offence, and shall be liable to be punished by whipping, on the bare back, within the discretion of the Court.

"The perjury was assigned upon evidence given by the defendant before a Court of Magistrate and Freeholders on the trial of slaves, the property of J. J. Kinsler and the defendant, charged with larceny and with the receiving of stolen goods.

"The negroes were arrested on Saturday, of which the defendant was informed, and of the nature of the charge; and on the same day he and Louisa, one of the negroes, were seen together between the brick yard and Columbia. On the trial, the defendant swore, that "at the time spoken of by Holley" (Wednesday after the arrest,) "he went down and received

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four dollars from Louisa, which was her hire. He objected to the marshal's taking his negroes, because he knew nothing at all about it. Burdell told him when he came down. He searched Louisa—her pockets, &c., but did not strip her. Dick said he had found some money near Claffey's bar last Monday. He thought he made search on Monday. *Did not go down the next day because it was Sunday,*" &c. It was admitted, that the defendant was at the brick-yard on Sunday after the arrest, which was directly contrary to the evidence given by him on the trial of the negroes before the Court of Magistrate and Freeholders.

"There was some evidence of the defendant's general character; but on this the witnesses differed in opinion.

"The jury was instructed that they must not only be satisfied that the defendant swore falsely, but wilfully and knowingly.

"If under the Act of 1833, the matter sworn to must be material to the issue, the motion for a new trial should be granted."

The defendant appealed, and now moved this Court for a new trial, on the grounds:

1. Because his Honor charged that it was immaterial whether the fact alleged to be sworn to was material to the issue in the original case; whereas, it is submitted, that the jury ought to have been told that unless the said fact was material as aforesaid, the defendant must be acquitted.

2. Because the said fact was not material as aforesaid.

3. Because there was no proof that the defendant had wilfully and knowingly sworn falsely in taking an oath required by law.

Also in arrest of judgment, on the ground, that the matters

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set forth in the indictment are not sufficient (even if proved) to warrant a conviction.

Tradewell, Gregg, Bellinger, for appellant.

Fair, solicitor, contra.

The opinion of the Court was delivered by

WARDLAW, J. The indictment contains two counts. Both allege that at the trial of slaves, before a Court of Magistrate and Freeholders, it "became a material inquiry," whether the incident occurred, as to which it is alleged that the defendant, sworn as a witness on the trial, deposed falsely: both conclude *contra formam status*: both, in deducing, at the close, the result found by the grand jury, allege in proper terms, the defendant's guilt of "wilful and corrupt perjury" in the course of a judicial proceeding, after an oath taken before a tribunal competent to administer it: the first, in assigning the perjury, uses the common law terms "wilfully and corruptly" along with "voluntarily:" the second, in such assignment, uses the words "*knowingly*, falsely, corruptly, wilfully and wickedly:" neither in express terms says that the oath was "required by law."

Either count sufficiently charges a common law perjury, and the conclusion, *cont. form. stat.* may be struck out as surplusage. (1 Chit. Cr. Law, 289; 1 Saund. 185, n. 8.) But the conviction of the defendant under the common law cannot be sustained, for the jury were instructed that the *materiality* of the matter falsely sworn to need not be investigated. By the common law the oath must be material to the question depending. It is not necessary that it should be directly material in substance to the very issue pending; for it may be only circumstantially and remotely pertinent; it may only affect the credit to be given to the witness, or serve to aid

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other more important evidence. (1 Hawk. P. C. c. 69, s. 8; 1 Ld. Ray. 258; *Regina vs. Overton*, 1 C. & Mars. 655; 41 Eng. C. L. Rep. 355.) If, however, it is wholly foreign to the purpose, perjury cannot grow out of it.

The attempt has been made to sustain the conviction without inquiry into materiality, by the Act of 1833, which has been recited in the report. That Act is supposed to have introduced a new definition or description of the crime of perjury, according to which it is sufficient to show false swearing in an oath required by law and administered by a competent person, and unnecessary to allege or prove the materiality. Admitting this, the conviction here was wrong, for here the materiality is alleged, and the allegation although beyond what was necessary must be proved. But in almost any oath required by law, which this Act might embrace, but which the common law of perjury would not include, there might be mixed up with what the law requires other idle and impertinent matter, which the law did not require, and to which the legal offence punishable by the Act would not extend. For instance, a tax payer in making return of the number of his slaves to a tax collector, might falsely and impertinently make statements about the qualities of the slaves, which would no more constitute perjury under the Act, than at common law it would be perjury for a witness in Court, when under examination in a case between third persons, to give a false answer to a question which the Judge might address to him, concerning some unconnected bargain between himself and the Judge.

We could then hardly attain the conclusion that materiality was unnecessary to be considered, even if this was to be regarded as an indictment wholly under the Act of 1833.

That Act in this case is important only as it may affect the punishment. The addition of whipping at the discretion of the Judge, to the common law punishment of perjury, which the Act makes, is urged by the solicitor as an argument to show, that the Act was intended to embrace all cases of per-

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jury: for the plainer cases, which had always been punishable, and which usually concern the most solemn proceedings, cannot be supposed less worthy of ignominious punishment than the new cases provided for by the Act. The words of the Act are susceptible of the construction which the solicitor has given to them, for every oath in which perjury at common law may be committed, may well be said to be required by law; but on the other hand, it is contended that the purpose of the Act was not to alter the punishment of all perjury, but to provide for cases of false swearing not before punishable. The Court reserves its opinion on this point. To those who may argue it hereafter, it is suggested, that the Act may have been intended to remove doubts as well as to increase the punishment, or extend it to new cases; that the earlier definitions of perjury at common law seem to regard as essential only a false oath taken before a competent person, and sworn positively in a material point, (3 Inst. 164; Com. Dig. Justices of Peace, B. 102;) that the modern decisions require the oath to be taken in a judicial proceeding before a competent jurisdiction, and to be material to the question depending, 1 Durn. & East, 69; and that at common law some false swearing, not strictly amounting to perjury, was an indictable misdemeanor. 8 East. 365.

Because of the misdirection in this case, the motion for new trial is granted.

O'NEALL, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion granted.

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VINCENT FLOYD & WIFE vs. ELIAS E. HODGE.

At a sale of the personal property of an intestate, his widow and her second husband purchased to a small amount, and gave the administrator a receipt for that amount, as her distributive share. The debts were sufficient to consume the whole personal estate, and were afterwards paid by a sale of the lands:—*Held*, that the widow was not barred of her dower, the personalty being the primary fund for the payment of debts, and there being no personal estate to distribute.

BEFORE GLOVER, J., AT SUMTER, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"The plaintiffs declared in dower, demanding that Martha Floyd, late Martha Allbrook and relict of the late Willis Allbrook, be endowed of a tract of land, of which the said Willis Allbrook was seized during the coverture.

"The land was sold by the sheriff, as the property of Willis Allbrook, and purchased by the defendant, who, in bar of demandant's right of dower, relied on the receipt by the plaintiffs, after their intermarriage, of the distributive share of the said Martha, in the personal property of Willis Allbrook.

"James W. Richardson, the administrator of the goods and chattels of Willis Allbrook, stated that plaintiffs purchased at the sale of the personal property to the amount of twenty-eight dollars and sixty-nine cents, and instead of giving a note, plaintiffs gave a receipt to the administrator for Martha's distributive share in the personal property sold, and that the amount of sales would not pay the debts of the intestate. He did not explain to the parties that the receipt by them of Martha's distributive share, would bar her right of dower, but they did receive it as her distributive share.

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"I instructed the jury that the widow could elect to take, either her distributive interest in her deceased husband's estate or her dower in such real estate as her husband was seized of during the coverture, and that any unequivocal act by the demandant would decide her election. I submitted to them to inquire, if the demandant had made such election, and if any fraud had been practiced (which was urged in the argument) to mislead the plaintiffs respecting the legal rights of the said Martha.

"The jury found for the demandant."

The defendant appealed and now moved for a new trial, on the grounds:

1. Because the verdict was capricious, without evidence, and against the charge of the Judge.

2. Because the evidence was uncontradicted of the acceptance of the distributive share of Mrs. Floyd in the personal estate of her first husband, Willis Allbrook, under whom she claims her dower, and there was, therefore, no room to presume or infer fraud.

3. Because the administrator was not bound to explain the law to demandant, and without proof of fraud she was barred after receipt given as in this case.

4. Because two witnesses, unimpeached, swore to one state of facts and the jury found another.

Spain & Richardson, for appellant.

J. S. Richardson, jr., contra.

The opinion of the Court was delivered by
O'NEALL, J. In this case I think the verdict was perfectly

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right. For according to the proof the personal estate was less than the debts, and of course there was nothing of it to distribute.

It is no answer to this to say, the real estate paid the debts, and that there is a surplus left for distribution.

In *Warley vs. Warley*, Bail. Eq., 397, the rule is very clearly settled, that in an intestacy, personal estate is the primary fund for the payment of debts.

Here therefore the widow cannot have had a distributive share of that which did not exist. The debts consumed or ought to have consumed the personal estate.

Independent of this conclusive view the jury were told to inquire whether the demandant had elected to take her distributive share of the personal estate, and also whether any fraud had been practiced upon her. They answered in her favor, on both these inquiries. How are we to say they decided them wrong?

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

Tryon vs. Robenson.

ENOCH TRYON vs. P. ROBENSON AND OTHERS.

In an action upon a bond, given by a plaintiff in Equity, in order to procure an injunction to stay a suit at law, it may be alleged and shown as a breach of the condition of the bond, that, by reason of the delay in obtaining judgment and execution, occasioned by the injunction, the property of the defendant, in the suit at law, was so wasted, sold, encumbered and disposed of, that the plaintiff lost his debt.

BEFORE GLOVER J., AT KERSHAW, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of debt on the penalty of an injunction bond. Defendants set out the condition on oyer, and pleaded, *non damnificatus*. The condition was set out in the following words: "Whereas the above named Polk Robenson, has, this day filed his bill of complaint in the Court of Equity, for the District and State aforesaid, against the said Enoch Tryon, praying that an injunction do issue against the said Tryon, to stay proceedings at law, on a note for three thousand four hundred and fourteen dollars, and ninety-six cents, made by the said P. Robenson, W. B. Campbell, and B. B. Salmond, now in suit, in the Court of Common Pleas for the District and State aforesaid, and whereas it was ordered by the said Court, that a writ of injunction do issue as prayed for in said bill, to restrain the said Tryon from further pursuing the said suit at law, until the further order of this Court, upon the complainant, Polk Robenson, entering into bond in the penal sum of seven thousand dollars, conditioned for the payment to the said Tryon of the full amount of any damage, or loss, which may accrue to him by reason of any injury resulting to him from the obtaining of this injunction; and whereas, this obligation is entered into in compliance with said order: Now, the condition of this

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obligation is such, that if the above bound Polk Robenson, W. B. Campbell, and William Kirkland, shall, and do well and truly perform all the conditions set forth in said order; heretofore recited, according to the true intent and meaning thereof, then this obligation to be void and of none effect; else to remain in full force and virtue." To this plea of defendants, plaintiff replied in substance, that, by reason of the injunction, plaintiff was prevented from having judgment and execution of his said suit at law, at the Spring Term of the Court of Common Pleas for Kershaw, for 1854, as otherwise he ought and would have done, and could only have his judgment and execution thereof at the Fall Term of said Court, in that year,—that by reason of that delay, divers goods and chattels, lands and tenements, of which the defendants in said action were seized and possessed, at the said Spring Term of the Court, for 1854, became and were so wasted, sold, encumbered, and disposed of, before plaintiff could, by reason of said hindrance and delay, caused by the injunction, have execution of his debt; that he lost the whole amount, although his judgment was taken and *fi. fa.* lodged as soon as he lawfully could, by reason of the said injunction. Upon the statement of the action by plaintiff's counsel proposing to prove the loss, as set forth in the replication, I intimated my opinion that, conceding the proof of the breach of the condition assigned in the replication, the plaintiff could not maintain his action; upon which plaintiff's counsel submitted to a non-suit, with leave to move the Court of Appeals to set the same aside."

Plaintiff appealed and now moved this Court to set aside the non-suit on the ground:

That the condition was not void, and the question of damages ought to have been submitted to the jury.

Kershaw, for appellant.

Taylor, contra.

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The opinion of the Court was delivered by

WHITNER, J., The brief presents in a plain and succinct way the points involved in this appeal.

The evidence was not heard on circuit, but upon the statement of the action by plaintiff's counsel, the Judge intimated an opinion that conceding the proof of the breach of the condition assigned, the plaintiff could not maintain his action, upon which plaintiff's counsel submitted to a non-suit with the usual leave.

Taking it therefore as established by the proof that the plaintiff was delayed in the recovery of his judgment, and that by reason thereof the goods and chattels, lands and tenements of the defendant were in the meantime so wasted, sold, encumbered and disposed of, that the plaintiff lost the whole amount of his debt, although his judgment was taken and his execution was lodged as soon as he lawfully could by reason of the injunction, did it or not present such a case as by the terms of the obligation and the nature of the proceedings, entitled the plaintiff to compensation by a verdict? The pleadings in the case lead to this inquiry. The action was debt on the penalty of an injunction bond. The defendants set out the condition on oyer, and pleaded *non damnificatus*. The replication of plaintiff presents the foregoing statement of facts which the defendants traverse in their rejoinder, and an issue was thereupon joined. In this way will be seen the true questions raised by the pleadings, and according to the evidence, should have been settled by the jury. There are other features to be remarked upon, but to this point we are brought, and it is the case made by the parties who may be supposed to have well understood the proper grounds on which to rest, on either side. Taking these facts then as found for the plaintiff, they justify a legal conclusion, that a wrong had been done, and an injury sustained.

The terms of the Act of the Legislature are very explicit, "a party applying for an Injunction to stay proceedings at

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law, shall give bond to the plaintiff at law for such sum and with such condition as the Court may direct." Act of Assembly, 1781. (7 Stat. 209.) These terms are in no way varied by subsequent Act of Assembly, 1840, (11 Stat. 108,) conferring power on masters and commissioners in equity on the same subject. Whence the bond at all, if not to provide for such a contingency as is alleged to have happened in this case?

The injunction to stay proceedings in a Court of Law, I presume must proceed upon the ground that the plaintiff at law was making use of that jurisdiction contrary to equity and conscience, but because this process of the Court of Equity may be wrongfully invoked and itself abused, and by an improper restraint this hindrance in the pursuit of a legitimate remedy may work an injury, the bond is required as a full and adequate indemnity. When in the progress of the case, the injunction instead of being made perpetual, has been dissolved, it may be assumed there was no just ground for the complaint.

The remedy has been postponed and defeated, is the allegation of plaintiff, and effected by an abuse of this process. Delay has been secured and waste has intervened—other incumbrances have stepped in and property of which defendant was seized has been sold and disposed of. The specific manner is not indicated, but it may be readily conceived that proof might be offered ample and conclusive, tracing the loss of the debt to such interposition. Analogies are at hand. If a senior execution has been suspended by an injunction, and during the suspension a junior execution is levied and property sold, the money so arising may be applied to the junior execution, and it is equally clear when the injunction is afterwards dissolved, the creditor has his election to proceed upon the bond or the execution. In such case, formerly, the money was required to be deposited before an injunction could be had. By the Act of Assembly, 1784, a bond with

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security is substituted for the deposit. *Mitchell vs. Anderson*, 1 Hill, 69.

It is proper, however, before I dismiss the case, to examine briefly the bond and order before the Court. With every disposition to enforce the remedy when recourse is had to the law Court, I am instructed, as the organ of the Court, to say, great perplexities are encountered because a more intelligible, uniform and exact practice is not observed by masters and commissioners in equity. These occasions are of frequent occurrence, as a reference to our cases will show. The terms of this order and bond furnish further illustration on this subject, and need only to be stated to suggest the difficulty ; a certified copy of the order was read, though perhaps not exactly germane, from which it appears the bond required was, "for the payment of the full amount of any damages or loss which may accrue by occasion of any *unlawful conduct* in obtaining the said injunction." The recital of the order in the bond is "for the payment of the full amount of any damage or loss which may accrue by reason of *any injury resulting* from the obtaining of this injunction," and "the condition of this obligation is such that if the above bound P. R., W. B. C., and W. R. shall and do well and truly perform *all the conditions set forth in said order heretofore recited* according to the true intent and meaning thereof," are the terms in which we find the condition of the bond. The want of congruity between the order made, the order recited in the bond and the condition, are manifest upon the reading. We may not hold this to be fatal. The Courts, in their efforts to secure the interest of the parties by just and legitimate construction of their contracts, have a right to expect their own officers to aid in its accomplishment by an exact adherence to intelligible forms.

The motion to set aside the non-suit is granted.

WARDLAW, WITHERS, and MUNRO, JJ., concurred.

Motion granted.

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THE STATE *vs.* E. B. FARROW.

In an indictment for perjury, it is enough to allege, that the defendant was "duly sworn" &c. : it is not necessary to allege, that the oath was taken on the Gospel of God, or Holy Bible, or according to the ceremonies of any particular religion.

The indictment need not allege, that the court at which the oath was taken, had jurisdiction of the subject matter of the suit, or of the discount—it is sufficient to allege, that the action, to which the discount was set up, was by summary process.

In an indictment for perjury, the prosecutor, unless he has a direct, certain and immediate interest in the record, is a competent witness.

BEFORE WITHERS, J., AT FAIRFIELD, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows :

"The defendant, was tried for and convicted of perjury. I never heard the indictment read, but the course of the case developed that the perjury was assigned of an oath taken before Judge Wardlaw, at Fairfield court house, when trying a summary process, brought by R. A. Yongue, against this defendant, upon a note given by him to Yongue for a watch ; in which case the defendant filed a discount for eighty-one dollars and fifty cents (being about the sum of what was due on the note) appeared with his book of entries as a physician, testified to his account, was closely cross-examined, and finally withdrew his discount before a decree was rendered for the plaintiff Yongue. I suppose, since no question was or is raised as to it, that the evidence sustained the perjury as it was assigned

"Whether the perjury has been sufficiently assigned in the indictment, that is to say, whether the motion in arrest of judgment, which is set down in the notice of appeal, be well founded, is a matter upon which I can make no observation

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as it was not submitted to me, and can be understood and adjudged only upon inspection of the indictment.

"Touching the grounds for a new trial, the following statement will suffice:

"The solicitor and the defendant's counsel defined the offence of perjury to the jury. I perceived no conflict in their views; and when I came to charge the jury, I so said to them; and but repeated what I supposed was quite agreed upon as a definition of the offence. But when speaking of circumstances to be proved as corroborating, I did not omit the word *strong*, which I observe is not used in that ground which purports to report my definition.

"If Yongue was not a competent witness, I have only to report, that I have no recollection, or memorandum, that he was objected to, on the trial."

The defendant appealed and now moved this Court, in arrest of judgment, and for a new trial, on the grounds, *inter alia*:

In arrest of judgment.

1. Because the indictment does not allege or state that defendant's oath was taken on the Gospel of God, or Holy Bible, or from religious persuasion, with uplifted hand; nor in what form or manner the oath was taken.

2. Because the indictment does not allege or charge, that the Court had jurisdiction of the subject matter of the suit of the prosecutor, nor of the discount of the defendant; and further because the amount of the discount offered by the defendant at the suit of the prosecutor was not stated or charged in said indictment, thereby preventing his Honor who tried the above case from knowing judicially whether the discount was not under or above the summary process jurisdiction, in either of which cases the subject matter would

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not have been within the jurisdiction of the Court; and no perjury could have been committed:

For a new trial.

2. Because the evidence of the prosecutor, R. A. Yonque, was admitted, when he was directly interested in procuring the defendant's conviction, thereby getting freed from judgment of defendant's discount still hanging over him, which interest made the prosecutor an incompetent witness.

***Buchanan*, for appellant.**

Melton, solicitor, contra.

The opinion of the Court was delivered by

MUNRO, J. In reference to the defendant's first ground in arrest of judgment, it is a mistake to suppose, that in an indictment for perjury, it is necessary to allege, that the oath upon which the perjury is assigned, was taken upon the Gospel of God, or Holy Bible; or that it was administered to the defendant according to the ceremonies of any particular religion. In the indictment in this case, it is alleged that "the said E. B. Farrow was then, and there, offered and appeared, as a witness, to establish and prove the discount so offered-by him, in the plea aforesaid, and was then and there duly sworn, &c." So far from this manner of stating the oath being objectionable, it is on the contrary in strict conformity with the most approved precedents, (see 3 Chit. Cr. L. 809,) and infinitely less liable to objection, than the mode of stating it, as suggested in the defendant's ground of appeal, as will be seen by reference to the case of the *State vs. Porter*, 2 Hill, 611.

As regards the defendant's second ground, because the indictment does not allege that the Court had jurisdiction of

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the subject matter of the prosecutor's suit, or of the defendant's discount—it is sufficient to say, that the allegation in the indictment, that the action to which the defendant set up his discount was on a summary process, is sufficiently specific, without setting out, either the amount of the plaintiff's demand, or of the defendant's discount—for if the discount had not been within the summary process jurisdiction, it would have been wholly inadmissible.

The only other ground we deem it necessary to consider, is the second ground for a new trial, which questions the competency of the prosecutor to testify, because, as is said, he was interested in procuring the defendant's conviction. The rule as to the competency of the prosecutor to testify in a prosecution for perjury, is thus stated in the 3d Vol. of Greenleaf's Ev., sec. 390. "The modern rule places the prosecutor in the same position as any other witness, rejecting him only where he has a direct, *certain, and immediate interest in the record.*"

Testing the prosecutor's competency by this rule, and assuming him to have been really indebted to the defendant, there was certainly nothing in the mere fact of his indebtedness that could extend to his competency; however it might affect his credibility, and which by the way, was a question, not for the Court, but for the jury.

As regards the remaining grounds of appeal, we have been unable to discover any thing in either of them, that can avail the defendant, without trenching upon the province of the jury.

The motion is therefore dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER, and GLOVER, JJ., concurred.

Motion refused.

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THE STATE *vs.* JANE OWENS.

An indictment for grand larceny, alleging that the goods are the property of A. is not sustained by proof that they are owned jointly by A. B. and C.

BEFORE WHITNER, J., AT ANDERSON, FALL TERM, 1856.

Every thing necessary to a full understanding of this case, is contained in the opinion of his Honor, Judge Glover, delivered in the Court of Appeals.

Harrison & Orr, for appellant.

Reed, solicitor, contra.

The opinion of the Court was delivered by

GLOVER, J. The defendant was convicted of grand larceny. The indictment alleges that the goods are the property of Joshua Owens, whereas, the proof is, that Joshua, Judith, and Michael Owens, are joint owners.

The defendant moves in arrest of judgment: "Because the indictment sets forth, that the bacon charged to have been stolen was the proper goods and chattels of one Joshua Owens; when, according to the proof, it was the joint property of Joshua Owens, Michael Owens, and Judith Owens."

She also moves for a new trial, "Because the evidence was not sufficient in law to authorize a conviction."

The names of the joint owners of goods stolen, if known, should be correctly averred in the indictment, and the evidence must support the averment. (*State vs. Ryan and Long*, 4 McC.

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16; *State vs. Dwyre*, 2 Hill, 287; *State vs. Risher*, 1 Rich. 219.)

Archbold's Crim. Pl. 33, 177, referred to by the solicitor, does not sustain his position, The English practice was the same as that which has been adopted in South Carolina, until it was modified by Statute. (7 G. 4, c. 64, s. 14.)

The proof in this case is, that Joshua Owens was jointly interested with two others, and therefore, contradicts the averment of ownership as alleged in the indictment, and is a good reason why the defendant should have been acquitted; but it is not a ground for arresting the execution of the judgment. (*State vs. Ryan & Long*, and *State vs. Dwyre*.)

This want of agreement between the allegation and proof of the ownership of goods sustains the motion for a new trial, which is, therefore, granted; and as the defendant is in custody, it is ordered, that she be released from confinement upon entering into recognizance in the sum of three hundred dollars, with two sureties in the sum of one hundred and fifty dollars each, before the clerk of the Court of Anderson district.

Motion granted.

O'NEALL, WARDLAW, WITHERS, WHITNER and MUNRO, JJ., concurred.

Motion granted.

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THE TOWN COUNCIL OF SUMTER *vs.* WILLIAM LEWIS.SAME *vs.* NOAH GRAHAM.

On 29th January, 1855, J. P. was elected treasurer of a corporation, and on the 30th January gave bond with W. L. as surety. On the books of J. P.'s predecessor appeared a receipt of J. P.'s for two hundred and fifty-two dollars and seventy-two, without date:—*Held*, that this was sufficient, *prima facie*, to charge W. L. in a suit for the defalcation of J. P.; that, even if the money was received before the bond was given, W. L. was liable.

BEFORE GLOVER, J., AT SUMTER, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"These were actions of debt, brought on the official bond of James Bell, Marshal, Clerk and Treasurer of the Council, against the defendants, his sureties, and were tried together.

"The breach assigned was the defalcation of Bell, in not accounting for various sums, alleged to have been received by him in his official capacity. Bell was elected marshal, clerk and treasurer, on the 29th January, 1855, and gave his bond the next day.

"In proof of the breach assigned, a book was produced, in which sundry entries were made, of money received by Bell, the first of which was two hundred and fifty-two dollars and seventy-two cents, received from Hudson, his predecessor in office. The entries were not in Bell's handwriting, but he signed a receipt at the foot of the page. Only one date appears, January 9, 1855. L. M. Ridgway acted as a substitute for the marshal about the middle of July, and on the 1st September assumed the discharge of the duties permanently. Bell's salary was three hundred dollars per annum. For twenty dollars and fifty cents no evidence was produced,

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and the only questions in dispute were 1st, whether Bell received the sum of two hundred and fifty-two dollars and seventy-two cents, before the liability of the defendants attached as his sureties, (30th January, 1855,) and 2d, was he entitled to the amount of his salary?

"The first and fifth grounds of appeal misapprehend the instructions to the jury. I expressly directed them to enquire if the sum of two hundred and fifty-two dollars and seventy-two cents was received by Bell from his predecessor before the date of the bond, or after that date, and if the latter, the defendants would be liable for it.

"They were informed that if, from the circumstances, they believed Bell was discharged before the end of the year on sufficient reasons, they would allow his salary *pro rata* for the time he served, otherwise that they would allow the whole salary.

"The jury found for the plaintiff three hundred and eighteen dollars and sixty-one cents."

The plaintiff appealed on the grounds:

1. Because his Honor instructed the jury to allow the defendants a credit of two hundred and fifty-two dollars and seventy-two cents, on the ground that this amount did not appear from the entry in the books of the Council to have been received after the execution of the official bond sued on.

2. Because it was in proof, from the journal of Council, that Bell was elected on the 29th January, 1855, and his official bond was dated 30th January, 1855.

3. Because any uncertainty as to date, arising from the default of Bell in not keeping the books correctly, should have raised a presumption against him and his sureties.

4. Because the proof was ample that Bell had received the

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sum of two hundred and fifty-two dollars and seventy-two cents, independent of his receipt, and his signature as "clerk" upon the books of plaintiff was conclusive.

5. Because the jury, under the instructions of his Honor, allowed the defendants the salary from the time of the election of Bell till the election of his successor.

Mayrant, for appellants.

Moses, Edwards, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case we think the motion ought to be granted.

The entry in the book of the 9th of January, 1855, was in relation to the entries debited and credited to the former marshal, clerk and treasurer, and the balance struck against him of two hundred and fifty-two dollars and seventy-two cents. Underneath that, but without date, was the receipt of the defendants' principal, Bell, the marshal, clerk, and treasurer, *in his official character*.

This was enough *prima facie*, to charge the defendants, his sureties, as for money received by him after he was rightfully in office. In the *Treasurers vs. Bates*, 2 Bail. 362, it was ruled that the admissions of the sheriff after he went out of office, that he had received the money while in office, was enough to charge the sureties. Surely an admission such as this entry, made in the official character of the marshal, treasurer and clerk, must have the same effect.

But I hold if he received the money before he gave the bond, it made him debtor to the Town Council for that sum, and on giving bond it was properly chargeable to him, as so much money in his hands, as the officer of the corporation,

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and that his sureties are liable for the same. *Joyner vs. Cooper*,
2 Bail. 199.

The motion is granted.

WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ.,
concurred.

Motion granted.

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WILLIAM L. BRUNSON *vs.* JOHN O'CONNOR.

J. O. was first endorser of a note in bank drawn by M., and W. L. and W. B. were second and third endorsers. The note in bank was taken up, and a note drawn by J. O., and endorsed by W. L. and W. B. substituted in its place. The bank, afterwards, recovered judgments against J. O., W. L., and W. B., on the note, and by arrangement among them, each paid a certain amount, and satisfaction was entered by the sheriff on the *fi. fa.*:—*Held*, that W. B. was not entitled to have the entry of satisfaction in the case against J. O. vacated, as made by mistake, and the *fi. fa.* enforced for his benefit.

BEFORE GLOVER, J., AT SUMTER, FALL TERM, 1856.

The report of his Honor the presiding Judge, is as follows :

"On the 28th January, 1852, Thomas McGee drew a promissory note for three hundred and fifty dollars, payable eighteen days after, at the Bank of Camden, to the order of John O'Connor, which note was endorsed by John O'Connor, William Lewis, and William L. Brunson, in the order in which they are named.

"The Bank obtained judgments against the maker and endorsers, and, the former dying insolvent, O'Connor, with Lewis and Brunson as his endorsers, had a note discounted in the Bank of the State to satisfy the judgment against them. On this latter note the Bank of the State obtained separate judgments against O'Connor, and against Lewis and Brunson.

"By agreement between O'Connor, Lewis and Brunson, O'Connor paid one hundred dollars, and, with the other two, an equal proportion of the balance. Lewis stated that this was the understanding of the parties; that he so understood his legal responsibility, and that he had paid his share of it, and did not care to inquire further.

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"Henry S. Eveleigh, deputy sheriff, was informed that this was the agreement of the parties, and he received from them and applied the money in that way. He understood from them that O'Connor should pay one hundred dollars, and that the balance was to be paid equally by the three.

"Satisfaction having been entered in both cases by the sheriff,

"At Spring Term, 1855, an order was passed requiring John O'Connor and John C. Rhame, sheriff, to show cause why the entry of satisfaction by the sheriff, in the case of the Bank of the State vs. John O'Connor, should not be set aside and vacated as made by mistake, and the *fi. fa.* enforced for the benefit of the said W. L. Brunson, to the extent of all payments made by him.

"Hearing the answer made by O'Connor and the sheriff, it was ordered by the presiding Judge, that an issue be made up, in which W. L. Brunson shall be the actor and John O'Connor the defendant, to determine the question whether the said execution be satisfied.

"On this issue the jury rendered a verdict for the defendant."

The plaintiff appealed, and now moved this Court for a new trial, on the grounds:

1. Because the endorsers of an accommodation note for the benefit of the drawer are not liable as co-sureties.

2. Because no agreement was proved on part of plaintiff *before endorsing* second note to the Bank, to be liable with the other endorsers, O'Connor and Lewis, on the first or McGee note, as co-surety.

3. Because no agreement between O'Connor, Lewis and Brunson in reference to their liability on the one note or the other was proved or pretended, until after judgment was

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obtained and *fi. fas.* issued on the second note, in reference to which the issue was ordered.

Spain and Richardson, for appellant.

Moses, contra.

CURIA, PER O'NEALL, J. We think the verdict was right, and must stand. It will be remembered that this is not an action to make endorsers on an accommodation note liable to one another as co-sureties, as was the case in *Cathcart vs. Gibson*, 1 Rich. 10; but it is an attempt by setting aside the entry of satisfaction to make the first endorser of the original note and the maker of the last note, refund a sum paid by the last endorser under an arrangement made among the three to produce satisfaction of all the judgments.

The jury were right to conclude that this payment was made in accordance with the original agreement between the co-endorsers.

There is no agreement *here* to be enforced by action; *nudum pactum* can have therefore nothing to do with it.

The parties have themselves carried out their agreement, and unless it was shown that this was done by mistake of fact, or of law, as was illustrated by *Lawrence vs. Beaubien*, 2 Bail. 623, there can be no claim for relief.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, MUNRO, and GLOVER, JJ., concurred.

Motion dismissed.

M'Donald vs. Bauskett & Carroll.

JOHN E. McDONALD, FOR ANOTHER, vs. JOHN BAUSKETT &
JAMES P. CARROLL.

The principal to a bond had given a mortgage of land to the obligee to secure the payment of the bond, and a bill in Equity was pending against the principal and M., his surety, to foreclose. B. and C. reciting that they were purchasers of the land, bound themselves, by sealed instrument, to M., the surety, 'to exonerate, discharge, and indemnify him, from and against any and all liability to pay the mortgage, or any part thereof, or any cost or expense thereon. And we hereby covenant and agree to take the place and stand in the shoes of the said M., and obligate ourselves, jointly and severally, to him, to repay and refund to him whatever amount he may have to pay on said bond and mortgage. And for the faithful performance of this covenant and obligation, we hereby, jointly and severally, bind ourselves to the said M., in double the amount that he may be called on and required to pay in the case,' then pending in Equity. A decree for foreclosure was afterwards rendered on the bill then pending: The land was ordered to be sold, and, at the sale, it was purchased by B., for a sum much less than M's. liability on the bond:—*Held*, that the covenant of B. and C., was not one of indemnity against the mere liability of M., on the bond, but was one of indemnity against loss or damage by reason of that liability,—that, therefore, M., could maintain no action against B. and C., until he had paid money on the bond.

BEFORE WITHERS, J., AT EDGEFIELD, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"McDonald, the plaintiff, was surety of one Sullivan, on a bond, to Burt, treasurer. Sullivan had executed as collateral security, to the treasurer, a mortgage upon a lot of land in Hamburg. Simpson had bought the lot of land from Sullivan, subject to the mortgage. When sold under execution against Simpson, Bauskett and Carroll bought, or Bauskett did. A bill in equity was pending to foreclose the mortgage

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executed by Sullivan, and Bauskett and Carroll executed the bond, a copy whereof is hereto annexed. There was evidence tending to show that both Sullivan and McDonald were insolvent; the former undoubtedly so, and the latter in all probability in like condition. The Court of Equity rendered a decree foreclosing the mortgage, and ordering the land to be sold, on terms prescribed, unless the debt and interest which it was mortgaged to secure, (one thousand eight hundred and sixty-one dollars and seventy-five cents, and interest) were paid before a certain time. This decree of foreclosure was founded upon a bill against McDonald and Sullivan both.

"The question was, whether the bond of defendants became operative, as an absolute obligation, upon the rendition of the decree of foreclosure, or whether it was a bond of indemnity to secure the reimbursement of McDonald for any sum of money, for debt or costs, which he should pay by virtue of the decree of foreclosure—or of his liability as surety of Sullivan.

"I held the latter construction to be the true legal one; and since he had paid nothing and proved no damage beyond the liability to pay the bond to the treasurer, there was nothing for him to recover.

"It is so awkward an instrument that I can have no confident opinion about its legal construction. While the prior part of it stipulates an exoneration from 'liability,' subsequent portions seem clearly to contemplate a payment of money as the condition of the obligation to respond to McDonald; and then there is the penal part, which is to be twice the sum that 'he may be called on and required to pay in the above case,' (meaning the cause in equity.) Now it occurred to me, that since nothing beyond the penalty of a bond, where there is a penalty, can be recovered, it might happen, that McDonald should never be 'called on and required to pay,' *i. e.*, he might never in fact pay any thing; or if he did pay, it might be one hundred dollars, and then the penalty would be two

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hundred dollars; whereas, he claimed now to recover the entire amount specified in the decretal order of foreclosure. This consequence seemed to involve an incongruity too great to admit the construction the plaintiff urged, when a view of the whole instrument was taken.

"Upon expressing such judgment, the plaintiff took a nonsuit, with leave to move to set the same aside."

(COPY BOND.)

Bill to foreclose a Mortgage.

We, the undersigned, John Bauskett and James P. Carroll, having become the purchasers of the corner lot in the town of Hamburg, conveyed and described by the mortgage, for the foreclosure of which the bill in the above case was filed, do hereby covenant, promise, and agree to and with John E. McDonald, the above named defendant, and security of Tully F. Sullivan, to exonerate, discharge, and indemnify him, the said John E. McDonald, from, and against any and all liability to pay the above-named mortgage, or any part thereof, or any cost or expense thereon. And we, the undersigned, hereby covenant and agree, to take the place, and stand in the shoes of the said John E. McDonald, and obligate ourselves jointly and severally to him, to repay and refund to him whatever amount he may have to pay on said bond and mortgage.

And for the faithful performance of this covenant and obligation, we hereby jointly and severally bind ourselves to the said John E. McDonald, in double the amount that he may be called on and required to pay in the above case.

Witness our hands and seals, this 29th day of January, 1846.

JOHN BAUSKETT, [L. S.]

J. P. CARROLL, [L. S.]

Witness, N. L. GRIFFIN.

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The plaintiff appealed and now moved this Court to set aside the nonsuit on the ground :

Because his Honor erred, it is respectfully submitted, in ruling that the bond sued upon is a mere bond of indemnity, to save harmless John E. McDonald, against any sum of money he might be called on and required to pay, and that the extent of the plaintiff's recovery is limited by the amount which the said John E. McDonald has actually paid.

Bonham, Moragne, for appellant.

Carroll, contra.

The opinion of the Court was delivered by

WARDLAW, J. The instrument which is sued upon, when taken as a whole, may be fairly construed to be an obligation of the defendants to indemnify the obligee, M'Donald, against all damages which may come to him from the bond in which he was surety for Sullivan, or from the mortgage which was intended to secure that bond. Under this construction, the penalty, (as it has been called,) might be considered to be in the nature of damages assessed by agreement, in proportion to the amount which M'Donald might be required to pay, and which the defendants were bound to refund to him. But whether it should be considered penalty or assessed damages, the plea of *non damnificatus* would, under this construction, have been good, and plaintiff could recover nothing until he had paid something. Actual damage sustained, and not loss apprehended, would constitute the ground of his action. (Sedgwick on Dam. 109, 190, 311, and cases cited.)

The plaintiff, however, says, that the obligation of the defendants is to indemnify him against liability, and that, he having become liable, they are bound to pay to him the

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amount of his liability. There is no doubt authority for nice distinctions on this subject, between indemnity against liability and indemnity against damages: between discharge from a particular thing and discharge from the effect of the thing: between a promise made to A. to pay a debt to B., and a promise to repay money paid by A. at one's request. (See note 1, *Cutler v. Southern*, 1 Saund. 116; *Chace v. Hindman*, 8 Wend. 452; *Holmes v. Rhodes*, 1 Bos. & Pul. 638 and notes; *Loosemore v. Radford*, 9 Mees. & Wels., 657.)

But where it has been maintained that liability alone, without damage, would sustain an action on a bond of indemnity, it has been required that the liability should be absolute and certain. *Rockfeller v. Donnelly*, 8 Cow. 623. In the case before us, the first covenant contained in the obligation, when taken separately, seems to bind the defendants to indemnify against liability to pay the mortgage. The mortgage was only collateral security for Sullivan's bond, and M'Donald, surety on that bond, cannot properly be said ever to have been liable to pay the mortgage. If by mortgage should be understood the bond secured by the mortgage, M'Donald's liability on the bond is just the same now that it was when he received the obligation from the defendants. To procure his quiet non-interference with bond or mortgage, could have been the only consideration for the defendants to make their obligation to him; but at the date of that obligation, proceedings in Equity, by Burt, treasurer, against Sullivan and M'Donald, to foreclose the mortgage, were pending; Mr. Bauskett, one of the defendants, being the complainant's solicitor; and under those proceedings at the next Court of Equity, the amount of the debt which the mortgage was intended to secure, was ascertained, and an order made for the sale of the mortgaged premises on a particular day, if the debt should not be paid. The sale took place, and the premises were purchased by Mr. Bauskett for \$100, he acting for himself as the plaintiff says, and acting for Burt, Treasurer, as defendants say. All this,

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however, shows no judgment against M'Donald for the balance of the debt remaining unpaid after the sale. (See *Gray v. Toomer*, 5 Rich. 268.) The liability is still on the bond, not more absolute than it was on the day when the defendants made this obligation. If the plaintiff has now a cause of action, then he had it the very instant he received the obligation, for the nature of his liability has been the same all the time.

It is said, however, that the plaintiff's security has been diminished by the sale at which his silence was purchased by this obligation. If so, he has a good ground for equitable relief, *quia timet*, but not for the recovery of a recompense for loss actually suffered. He has paid nothing, perhaps can pay nothing, and never will be able to pay anything. Shall he recover from the defendants, and appropriate to himself money which, if it should be paid, should be paid to Burt, the obligee of the original bond? A court of law has no machinery at command for doing justice all round, by making satisfaction to Burt through means of an obligation payable to M'Donald. But the plaintiff's attorney says that this suit is for the benefit of Burt, and that to him the money will go. That cannot alter the case. This Court takes notice of equities under assignments made of instruments which are not at law so assignable that the assignee may sue in his own name: but in all such cases the assignee, although protected by the Court against his assignor, is limited to precisely the same remedy and the same extent of recovery, which can be had by that assignor whose name he must use. What M'Donald could recover if suing for himself, and no more, M'Donald may recover when suing for Burt. No interposition of an equitable assignee can enlarge the powers of the Court, or change the rights presented for adjudication between the persons who are the parties before the Court. If then under the construction of their obligation, most unfavorable to the defendants, a breach of it, by an absolute liability fixed upon

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M'Donald, had been shown, the Court is not satisfied that, without payment or other actual damage, there could have been a recovery of more than nominal damages; and for this recovery the case would not be sent back.

There is an old case of our own, *Ramsay v. Gervais*, 2 Bay, 145, by which (if all that is set down by the reporter was held by the Court) this plaintiff's recovery from these defendants of the whole balance due by him on the bond to Burt, might be justified. But upon examination, it will be found that the point really decided in that case was, that a judgment by default would not be set aside to enable the defendant to make a defence considered inequitable. There the protest of a note, in which the defendant was maker and the plaintiff accommodation endorser, was said to give to the plaintiff a right to recover the full amount of his liability on a bond given by the defendant to the plaintiff, to indemnify the plaintiff against all the consequences and damages which might arise from the endorsement. Both parties, maker and endorser, were sued by the Bank endorsee; and it is said to have been thought highly justifiable for the plaintiff, by all lawful means to get the money from the defendant, and be "beforehand with the officers of the Bank." Suppose the plaintiff, being beforehand, had enforced payment to himself, and being insolvent, had squandered the money. This would not have relieved the defendant from the necessity of paying again to the Bank, although it would have cut off his hope of being reimbursed by the plaintiff. Or suppose cotemporaneous judgments by the plaintiff and the Bank against the defendant. As the Court will prevent double satisfaction being taken from two defendants adjudged in separate actions to pay the same debt, it might, in analogy, prevent two satisfactions of the same debt, recovered in separate actions by different plaintiffs, being exacted from one defendant; and when payment had been made to the Bank, and of costs to the plaintiff, satisfaction, under this exercise of equitable

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jurisdiction by this Court, might have been entered of the plaintiff's judgment. In this view, the plaintiff's judgment would have been only a precautionary lien on the defendant's property, not really more serviceable to the plaintiff than the judgment of the Bank standing singly, would have been.

But in a case like the one before us, where indemnity is undertaken by a third person who is not liable to the original creditor, when a recovery has been had by the indemnified against the indemnifier, of the whole amount of liability, how can the creditor be interposed? Or how by any payment, except that made to the plaintiff in the recovery, can satisfaction be wrought? By the consent of the plaintiff, all might be made to work well, but our decisions cannot proceed upon the assumption of a party's consent to waive the rights which we adjudge to him; and the actual consent, said to have been given in this case, cannot affect the principle of recovery. That principle must be general—such as would be applicable to all cases brought by a plaintiff standing as M'Donald does in this case. (See *Sims v. Goudelock*, 6 Rich. 111.)

It appears to the Court the nonsuit was properly ordered, and the motion is dismissed.

WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

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JOHN JOLLIFFE vs. FANNING & PHILLIPS & OTHERS.

Upon a question of probate, the inquiry is, whether there be a valid will, in whole or in part; if only so much be valid as revokes prior wills and appoints executors, still it must be admitted to probate.

A clause in a will, void under the first section of the Act of 1841, because it directs certain slaves of the testator to be taken beyond the limits of the State and there emancipated, does not vitiate the will upon a question of probate.

Nor is a will invalid upon a question of probate because it contains a devise and bequest for the benefit of slaves, such devise and bequest being void under the fourth section of the Act of 1841.

Whether clauses in a will directing certain slaves to be taken to Ohio and there emancipated, and making provision for such slaves out of the other estate of the testator, are void under the Act of 1841, is a question which belongs to a Court of construction and administration, and not to a Court of probate: *Semble*,

Will impeached upon certain legal grounds, and also upon grounds presenting issues of fact as to fraud, undue influence and insanity. Verdict against the will set aside, and new trial ordered, the Court holding the legal grounds insufficient, and that there was nothing in the evidence to sustain the allegations of fraud, undue influence and insanity.

BEFORE O'NEALL, J., AT BARNWELL, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"Elijah Willis (having neither wife nor legitimate child,) in 1846 made a will, of which, Fanning and Phillips, two of his brothers-in-law, were executors. On the 23d of February, 1854, he, in the city of Cincinnati, Ohio, made (as appellant alleges,) another will, duly executed according to the forms of law.

"Elijah Willis, taking with him his negro slave, Amy, and her children, and her mother, in May, 1855, left his home, near Williston, Barnwell district, for Cincinnati, Ohio. He

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arrived in a steamboat, and leaving it at the landing, on the Ohio side of the Ohio river, he died between the landing and a hack, in which he was about proceeding, with his said negroes, to his lodgings.

"On the news of his death reaching South Carolina, or soon after, the will of 1846 was proved. Previous to which, to wit., on the 23d of May, 1855, the will of 1854 was proved in Cincinnati, Ohio, and John Jolliffe alone qualified; the other two executors, Edward Harwood and Andrew H. Ernst, having renounced the executorship.

"Soon after, Mr. Jolliffe came on to South Carolina, and propounded the will for probate here; and by consent of all concerned, without entering into proof, a decree *pro forma*, refusing to admit the will to probate, was entered by the Ordinary, and this appeal was taken.

"A bill in equity, by Michael Willis and others, heirs-at-law of Elijah Willis, deceased, had been filed against John Jolliffe, of Ohio, and others, in which the complainants stated the will of 1846, and that the deceased had duly made and executed another will in Cincinnati, Ohio, on the 23d of February, 1854, of which the defendant, Jolliffe, was executor. This will, they contended in the bill, was void under the Act of 1841. This bill was sworn to, in order to obtain some of the prerogative writs of the Court of Equity.

"It appeared that Elijah Willis, in the city of Cincinnati, in the office of Jolliffe & Gitchell, attorneys at law, on the 23d of February, 1854, executed the will propounded (a copy of which accompanies this report,)(a) in duplicate, in the pre-

(a) The following is a copy of the will of 1854, executed in Cincinnati. Below it is a copy of the Act of 1841.

Copy of the last Will and Testament of Elijah Willis, Deceased.

In the name of God, Amen. I, Elijah Willis, of Barnwell District, in the State of South Carolina, being now in the city of Cincinnati, in the State of Ohio, in good bodily health, and of sound and disposing mind

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sence of Wm. B. Shuttack, E. Penrose Jones, and James Gitchell, who, in his presence, witnessed the execution. They

and memory, calling to mind the frailty and uncertainty of human life, and being desirous of settling my worldly affairs, and directing how my estate shall be disposed of after my decease, while I have strength and capacity so to do, make and publish this, my last will and testament, hereby revoking, and making null and void, all other "last wills and testaments" by me heretofore made.

Imprimis. My will is, that all my just debts and funeral expenses shall by my executors hereinafter named, be paid out of my estate, as soon after my decease as shall by them be found convenient.

Item. I give, devise and bequeath to my executors hereinafter named, my slaves, as follows: Amy, and her seven children—Elder, Ellick, Philip, Clarissa Ann, Julia Ann, Eliza Ann, and Savage—with any other child or children to which the said Amy may, at any time hereafter, give birth, and the children and descendants, if any there may hereafter be, of any of said above named slaves or persons. The said executors to bring or cause said persons, and their increase, to be brought to the State of Ohio, and to emancipate and set them free in said State of Ohio.

Item. I give, devise, and bequeath the whole of my estate, real, personal and mixed, of what nature or description soever, and wheresoever the same may be situate or found, to my said executors, or to such one or more of my executors hereinafter named, as may act in that capacity, and, if from any cause, the said executors shall fail or refuse to act, under this will, to whatever person or persons may be appointed to carry this will into effect, to hold the same to my said executors or executor, or to the survivors or survivor of them; and, in the event of their failing or refusing to act, to said administrator or administrators, in fee-simple: with full power to sell and convey the said real estate in fee-simple, and to sell the same either at private or by public sale, and upon such terms and payments, and modes of securing the payments, and at such time or times as to them may seem fit: Also, with full power to sell any or all of my personal property, whatsoever and wheresoever the same may be—except the slaves above named, and any child or children which may hereafter be born to either or any of said slaves.

Item. I give, devise, and bequeath to my said executors, or to such of them as may act in that capacity, or in the event of said persons named herein as executors, failing or refusing to act, then to the person or persons administering upon my estate, under this will, all monies, stocks, bank notes, bonds, bills, mortgage and other securities for debts due to

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all agreed in their proof, that he was then in his right mind. Mr. Gitchell, who prepared the will, said it was drawn accord-

me, or that may be due to me, either before my death or at the time of the occurrence thereof, or that may not be fully matured as to the time of payment, at my decease, with all household and kitchen furniture, and all farming and planting implements, tools and materials, as fully as if each and every article of all my personal property, goods, chattels, monies and effects, of what nature or description soever, was herein especially named and enumerated.

Item. I direct, that, from the nett proceeds of the sales of said real estate and personal property, and of the monies, goods, chattels and effects, of whatsoever nature, herein devised to my executors, my said executors, or the survivors or survivor of them, or any administrator under this will, shall bring, or cause the said Amy and her children to be brought to the State of Ohio, as hereinbefore provided. And after paying the necessary expenses of administration and settlement of my estate, shall, at some suitable place, within some one of the free States of this Union, purchase such lands, and at and for such price or prices as to them may seem best, and take deeds for said lands to and in the name of such emancipated persons as above provided; and that in taking such deeds care be taken that each of said persons shall have a full and equal share of said real estate, quantity and quality considered; said executors or administrators to devote the whole of the residue of the funds of my said estate remaining in their hands, after the payments above provided for, to the purchase of said lands, and stocking and furnishing the same, and placing said persons in possession thereof; and in the event of the death of one or more of the above named persons leaving any child, or children, previous to the period of the purchase and distribution of such lands, such child, or children, shall succeed to and take the share or shares of its or their parent or parents.

Lastly. I nominate and appoint Edward Harwood, Andrew H. Ernst and John Joliffe, all of Hamilton county, in the State of Ohio, executors of this my last will and testament, and do hereby authorize and empower them or either of them, acting as such executor, to employ such agent or agents, attorney or attornies, with full power to do whatever either or all of my said executors could themselves do, to proceed to South Carolina or wherever else may be necessary in the settlement of my estate, as to my said executors may seem best, and to pay the person or persons so employed a reasonable compensation for services rendered, out of the proceeds of my said estate. And if, from any cause, any one or

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ing to his instructions ; that he took one of the duplicates and read it to the testator, while he read the other ; that it was

two of said persons shall neglect, or refuse, or fail to act as such executor, I direct that the survivor, or person acting as such executor, shall have full power under this will to act as if he alone was named as sole executor herein, and to sell and convey by valid deeds said real estate and personal property, or any part thereof, and to do whatever is herein provided to be done.

In testimony whereof, I, the said Elijah Willis, have to this my last will and testament, contained on one sheet of paper, subscribed my name and affixed my seal, this the twenty-third day of February, in the year of our Lord one thousand eight hundred and fifty-four, and the same is executed in duplicate, both which are to be, and are originals ; one to be left with my executors at Cincinnati, and the other to be taken by myself to South Carolina.

ELIJAH WILLIS, [L. S.]

Signed, sealed, published, and declared by the said Elijah Willis as and for his last will and testament in presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses hereto.

W. B. SHATTUCK,
E. PENROSE JONES,
JAMES M. GITCHELL.

*An Act to prevent the emancipation of Slaves, and for other purposes,
Passed A. D., 1841.*

I. *Be it enacted*, by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That any bequest, deed of trust, or conveyance, intended to take effect after the death of the owner, whereby the removal of any slave or slaves, without the limits of this State, is secured or intended, with a view to the emancipation of such slave or slaves, shall be utterly void and of no effect, to the extent of such provision ; and every such slave so bequeathed, or otherwise settled or conveyed, shall become assets in the hands of any executor or administrator, and be subject to the payment of debts, or to

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then executed, the testator retaining one and the executor, Joliffe, the other.

"It appeared that the duplicate left with Joliffe, had been proved, and was of record in the Court of Probate, Cincinnati, Ohio, and the other (found on the body of the deceased,) was now before the Court. That the testator was then, and ever had been, of sound mind, memory and understanding, was, I thought, most abundantly proven by the subscribing witnesses, and Ernst, Harwood, Cullum, and Dunning, of Ohio, and by William Knotts, Wm. B. Beasley, Reason Wooley, Col. Hagood, Commissioner in Equity for Barnwell district, Messrs. Edwin, Willis, and Thomas Stansell, Joshua Ashley, Dr. Hagood, and Jonathan Pender, of South Carolina. The statement in the bill, that he had duly executed the will, was, I thought, very strong against the appellees.

"The appellees undertook to show insanity, fraud, and undue influence, by proving by Dr. Harley, Dr. Guignard, and Dr. Needham Davis, Robert W. Matthews, and I. Watson

distribution amongst the distributees or next of kin, or to escheat, as though no such will or other conveyance had been made.

II. That any gift of any slave or slaves, hereafter made, by deed or otherwise, accompanied by a trust, secret or expressed, that the donee shall remove such slave or slaves from the limits of this State, with the purpose of emancipation, shall be void and of no effect; and every such donee or trustee shall be liable to deliver up the same, or held to account for the value thereof, for the benefit of the distributees, or next of kin.

III. That any bequest, gift, or conveyance, of any slave or slaves, accompanied with a trust or confidence, either secret or expressed, that such slave or slaves shall be held in nominal servitude only, shall be void and of no effect; and every donee or trustee, holding under such bequest, gift, or conveyance, shall be liable to deliver up such slave or slaves, or held to account for the value, for the benefit of the distributees, or next of kin, of the person making such bequest, gift or conveyance.

IV. That every devise or bequest, to a slave or slaves, or to any person, upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void.

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Matthews, that the deceased was often under gloomy depression of spirits—avoiding society on account of his connection with Amy, by whom he had several children; that he permitted her to act as the mistress of his house; to use saucy and improper language; that she was drunken, and probably unfaithful to him; and that she exercised great influence over him in reference to his domestic affairs, and in taking slaves from his business, to make wheels for little wagons for his mulatto children, and in inducing him to take off for sale the negro man who was her husband. Mr. James T. Aldrich saw him on a boat, returning from Wilmington, after a trip he had made, with these slaves, to Baltimore. He appeared abstracted and reserved; did not know the witness when he first spoke to him; shook hands with him with reserve; afterwards talked with him freely; complained of being charged one hundred dollars by a physician in Wilmington, for attendance on one of these slaves.

“From Drs. Harley, Guignard, and Davis, it appeared, he was always anxious to secure the freedom of, and make provision for, Amy, and her children by him. Dr. Harley said, he never thought any of the matters he proved, affected his intellect. I thought there was not the slightest ground to say that the testator was not of sane mind, or that there was fraud or undue influence.

“The only real question in the case was, whether the will was void under the Act of 1841. The first clause of the will (if the slaves had not been in Ohio at the death of the testator,) would have been clearly void under the first clause of Act of 1841. The second and third clause of the will, devising and bequeathing the whole estate to the executor, were, I thought, good. The fourth clause, directing investments for the benefit of Amy and her children, may, or may not be void, under the fourth clause of the Act of 1841. That would, I thought, be properly adjudged in the Court of Equity, under the bill there filed, and now pending. So, too,

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even the appointment of the executors might prevent the whole will from being adjudged void under the Act of 1841. The jury, notwithstanding my views as herein expressed, found against the will."

The plaintiff, John Jolliffe, appealed, and now moved for a new trial, on the ground, that the verdict is contrary to law and evidence—it being clearly and undeniably proved that the paper propounded was executed in due form of law, and in the entire absence of fraud, insanity and undue influence—nor was there any pretence of revocation—nor was there any thing in the policy of the State, or in the Act of 1841, to sustain the verdict of the jury, who must either have labored under gross ignorance, or been led astray by public clamor.

Bellinger, Bauskett, for appellant.

Aldrich, Owens, contra.

The opinion of the Court was delivered by

WITHERS, J. When it is remembered that the sole question in this case is, whether the paper propounded as the last will and testament of Elijah Willis, should be admitted to probate, many of the topics, and the discussion that has attended them, must vanish, as irrelevant to the proper subject before us. Upon the question of probate the inquiry is, whether there be propounded a valid will; not whether certain of its provisions are against the law, statute or common, or against any such State policy as a Court may notice. These last considerations belong to construction and administration, and, however they may operate to explode certain provisions, yet, if enough remains to make a will or testament, the same is undoubtedly entitled to probate. Whether we take one definition or another of a will—as that adopted

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by Ch. Kent, "a disposition of real and personal property, to take effect after the death of the testator," or that derived from the Roman law and approved by Swinburne, Godolphin and Blackstone, especially for its precision, "the just sentence of our will touching what we would have done after our death"—it is always true, that if valid in part, though void in part as to its provisions, it is a will; and if it be, probate and letters to executor, or to one in lieu of him, should be issued.

Where it becomes necessary to draw from the contents of a paper presented as a will, evidence touching its due execution and validity as such, any tribunal charged with the examination of that subject, is authorized to scrutinize the contents. As, for example, whether a provision in the paper may affect the competency of an attesting witness, and whether the statute of 25 Geo. 2, applies to make the witness a good one; whether all that is presented was executed by the testator, or a portion was not and has been surreptitiously interpolated; whether the contents be such as render the paper wholly void, by force of a statute, if any such there be, and the like. But if the paper be duly executed by one competent, agreeably to the forms prescribed, and in the presence of the requisite number of credible witnesses, and contain the revocation of all prior wills and the appointment of an executor, (as the testamentary paper before us does,) and be silent, in fact, or for want of validity, as to all other matters, it is a *will*, and must be admitted to probate accordingly.

This is not denied by those who oppose Jolliffe, the executor; but they say that the paper in question is void in all its parts, because, first, its provisions show it to be at war with the settled policy of this State as to slavery and emancipation; and, second, those provisions make it void in whole, by virtue of the words of the fourth section of the Act of Assembly, 1841, as follows: "Every devise or bequest to a slave or slaves, or to any person upon a trust or confidence, secret or

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expressed, for the benefit of any slave or slaves, shall be null and void."

1. The first "item" of the paper before us is in contravention of the first section of the Act of 1841. But the evidence shows that such provision, (which bequeathed certain slaves to the executors, to be carried to Ohio, and there emancipated,) has been superseded by the testator himself, who carried said slaves to Ohio in his lifetime, there left them, and there they remain, so far as we know. That this very item was not in conflict with the "policy of this State," prior to the Act of 1841, cannot be affirmed, except by over-riding the decision of *Frazier vs. Executors of Frazier*, 2 Hill, Ch. 204. However such provision in a will may contravene the first section of the said Act of 1841, it is quite material to inquire what consequence follows? Not that the whole will shall be void, but (says that Act) that slaves bequeathed to executor for removal and emancipation, "shall become assets in the hands of any executor or administrator, and be subject to the payment of debts," or to distribution or escheat as the case may be.

Here, then, is one of the latest prohibitions against emancipation, and the design to procure it by means of explicit testamentary provision; and yet when (not the *policy* of the law, but,) its *express words* are violated, the whole will is not annulled, but is "utterly null and void to the extent of such provision;" and the executor is expressly recognized and held to the execution of a trust legislatively substituted for that vacated, to wit: to hold the slaves, whose emancipation is intercepted, as assets for payment of debts, for distribution, or for escheat. It is thus manifest that if the slaves transported to Ohio by Elijah Willis, in his life-time, were now here, and in the hands of his executor, the will of the deceased would not be void, *in toto*, on that account; but by plain words in the Act of 1841, would subsist for such purposes as should be lawful. If, therefore, a will containing such provision, and applicable to an existing state of things, be not

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excluded from probate by the last and most concentrated exposition of the legislative will, or the "policy of the State," how shall we exclude from probate a will, the obnoxious provision of which, now in view, is rendered null by the act of testator, by virtue of a supposed *policy* to be extracted from an antecedent course of legislation, gradually becoming more stringent, it is true, against the emancipation of a slave, but far more mitigated in every feature and at every step than the Act of 1841?

We have been led to use the terms "policy of the State," because a ground of appeal and much argument employed to support it, suppose that the proffered will meets total destruction from that source. If more be meant by "policy," than the will of the sovereign power, as ascertained by fair construction of constitution or statute proclaiming that will, it is prudent to say that, as a Court we have no other source of information as to any thing that may be called policy; that no safe rule of decision, in a particular case touching the rights of individuals, can be derived from the arena of politicians—from the heat and light of a current contest, however intense and however momentous the subject, and the consequence involved; from any condition of public opinion, co-extensive though it be with the limits of the State, but as yet not moulded into the semblance and substance of law. In fact, if the thing be possible, the more exasperated may be the political contests of people or States, while engaged in the form of high debates, the calmer should it be our duty to preserve the judicial atmosphere when the question enters the forum, where it must rest alone upon existing law. Resorting, then, to our only source of ascertaining "policy," or a legitimate rule of decision, to wit: the statutes as to emancipating a slave, we might say, were it required for the case, that it would be difficult to find in any or all our Acts of Assembly, such restraint upon the right of slave property as prohibited the master from carrying his slave to Ohio, and

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clothing him with such freedom as he could there bestow. But we have seen already that any opinion upon this subject will not settle the question of probate claimed for the will propounded; that if this effort to emancipate had been left for the executor to undertake, and the slaves so to be disposed of were here in his hands, nevertheless probate must be granted; the first section of the Act of 1841, contemplates it. There is an executor appointed: he is charged by law, as well as by the will, with payment of debts: he is by law invested with the legal property in personalty, to be held for the trusts of the will if lawful, and so far as they are so, which cannot be decided upon a question of probate; and, consequently, if this Court were to explore a proper or improper field for the policy of the State, it would, for the purposes of the present question, be a fruitless exercise, however otherwise engaging.

But second—Does the fourth section of the Act of 1841, utterly destroy this will? Its terms have been quoted. To maintain this position, the argument assumed, and was obliged to assume, that “devise” meant will, and that “bequest” meant testament; for a *devise* or *bequest* for the benefit of a slave is declared null and void. Chancellor Kent, in Lecture 68, first paragraph, observes as follows: “When the will operates upon personal property it is sometimes called a *testament*, and when upon real estate, a *devise*, but the more general and the more popular denomination of the instrument, embracing equally real and personal estate, is that of last will and testament.” If it be admitted that in certain instances and circumstances the words in question may have been used as is contended, still, without weighty reason, we should not wrest them from the more popular and general sense; and that certainly is, that they mean provisions in a will and testament; much less should we disregard what may be here considered the context, to wit: the first and third clauses of this Act. They certainly distinguish

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between bequest and will or testament, and the first section expressly uses the word "provision" as equivalent to bequest, or deed of trust or conveyance, and confines the word bequest to the particular kind of bequest described. There is no reason to enlarge the meaning in the fourth clause beyond that in the first; no more reason that a will should totally perish because of one provision, devise or bequest, than the other. It would, indeed, be most unreasonable to hold that a will should totally fail, in all its studied and beneficent provisions, merely because a small gratuity should be specified for a favorite slave; and such would be the consequence of the rule of construction which is urged upon us. Surely it is enough to subserve any ideas of *policy* or any necessary or reasonable sense of this law, to apply it only to the obnoxious provision, by way of devise or bequest, that the great right of testamentary disposition may not be too boldly invaded; *ut res magis valeat quam pereat*.

If, however, the interpretation proposed be allowed, another essential question lies behind; one of no little consequence, to wit: whether the beneficial interest, the trust, be for the benefit of slaves; and if that be resolved in the affirmative, still another question remains, to wit: if the appointed trust fails, whether the executor must not hold for the next of kin, (supposing he cannot take beneficial interest to himself,) or in case there be no legatee or distributee capable to take, whether he must not hold subject to the right of the State on escheat. Now whether the slaves carried to Ohio by Willis have thereby acquired the *status* of freedom, and so can take the legacy designed for them, is a matter that would call for grave consideration, on which we need not decide upon this mere question of probate, and which we ought not to prejudge, since it may become, probably is pending, as a distinct question in another forum. We have been referred to much learned discussion, more or less directly bearing upon the question, but from what is already said it is apparent that its

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discussion now and here would be merely voluntary. But if such questions as are herein indicated do or may arise upon the *construction* of the paper in question, and when, as has been shown, their determination in any way leaves still what may be a good will, is it not an argument to ask, how can they be appropriate to a proceeding for probate?

The foregoing must serve to dispose of all the positions that seek a foundation in the Act of 1841.

The other points taken, concern the evidence upon the questions of *fraud* upon the testator, *undue influence*, and incapacity by reason that he was *insane*.

As to *fraud*—There was none upon Willis as to what the will contained. It was executed in duplicate. One copy was read while he had before his eyes the other. He retained one, the other was left in Cincinnati, where it was admitted to probate. But it was surmised that there was evidence tending to show that Jolliffe, the appointed executor, had designs to devise some means whereby he should cause the body of testator's slaves, now in Barnwell District, and whom he is directed to sell, to be emancipated. Whether the evidence affords good ground to believe that such is Jolliffe's design, we do not determine; but assuming it as established, it is presumed that those thereunto moved by interest know how to enforce the due and honest execution of trusts by Jolliffe, and the conclusive answer is, that the infidelity of Jolliffe cannot make a fraud upon the testator in the execution of the will.

As to *undue influence*—The testimony is wholly silent as to any such influence over Elijah Willis in the matter of his will, unless it can be imputed to the negro woman Amy, whom he allowed, though his slave, to occupy a level with himself, and to become the mother of his children, or unless something of that kind can be derived from the provisions of the will. The substance of the evidence upon this point is found grouped in the report; and when it is remembered that the will was made

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in Cincinnati in the absence of Amy, more than a year before the testator's death, a copy retained by him during the whole time; and when we advert to the numerous cases in our own books, of a character so much stronger than this, where this objection has been overruled, it would be a waste of time to argue the subject. There is no evidence that the testamentary paper was not the free and voluntary act of the testator; nor can the disgust which is properly felt at the course of conduct that supplied the motive to make such provisions as the will contains, in favor of such beneficiaries, be permitted to blind us to the fact, that such motives and such provisions and such objects of bounty were perfectly consistent with the unconstrained pleasure and natural sentiments of such a man as Elijah Willis was.

As to *insanity*, it appears to this Court that there is quite as little ground (to say the least of it) to impute that, as there is to allege undue influence. If, as already said, the contents of the will show nothing inconsistent with such reason and natural emotion as might control a man in the unhappy and disreputable condition of Willis, it was not insanity in him, to obey their dictates. Nor can this be found in the fact that, in his efforts to confer freedom and fortune upon his negro slave mistress and his own children by her, he also included their half-brothers; and that their grand-mother also, so far as transportation to Ohio is concerned, subsequently attracted his attention, and he carried her with the rest. If he had determined to sell Amy and her children, it would have been in accordance with the prevailing sentiment among us to include in the transfer Amy's mother likewise. It is not at all strange, therefore, that he included her in the party that he carried to Ohio. Not in the least does it argue insanity that Willis should resort to such a man as Jolliffe, under the advice (as it is said) of Mr. Clay. To what other description of people should he apply to aid in the object he had in view? He could not find suitable co-adjutors in the next of kin here,

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and would be met by the opposition of the law, and no doubt that of individual and general sentiment in any trust he might attempt to lodge in any one within this jurisdiction, calculated to carry out his natural designs; and, therefore, however he may have detested Abolitionists, he relented so far as concerned Amy and her family, and circumstances drove him to a place and people beyond the limits where slavery prevails to find the aid which he needed; but as respects the slaves left by him in this State, he did not adopt the advice pressed upon him by Harwood to free them.

As to the moody silence and reserve; the avoidance of society; a sigh when he beheld the living examples of his shame, and such like exhibitions, reported by certain witnesses, it is most obvious that the more rational his reflections and forecast, when he contemplated the channel through which he must hand down his blood to posterity, and the probable fortune of those who had sprung from him, the deeper must have been his gloom, the more bitter his remorse. Advancing age and approaching death could but heighten their intensity—surely we have no warrant to trace such circumstances to insanity.

As to the objection that the paper propounded is not sufficiently identified, by unobjectionable evidence as a copy of the will executed in duplicate in Cincinnati, (and with exact formality it is not denied,) it is enough to say, we can see no plausible foundation for such objection.

It results that we can discover no legal basis upon which the verdict can stand; we apprehend it may be due to the idea the jury had of an insuperable obstacle to be found in notions of State policy, or in the provisions of the Act of 1841, neither of which affords them any foundation; and we, therefore, order a new trial.

O'NEALL, WARDLAW, WHITNER, GLOVER and MUNRO, JJ., concurred.

New trial ordered.

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Leggett vs. Insurance Company.

WILLIAM L. LEGGETT vs. THE ÆTNA INSURANCE COMPANY.

To a valued policy of insurance against fire, on a "stock of goods and merchandize contained in" plaintiff's store, one of the conditions was that "the keeping of gunpowder for sale or on storage, *upon or in the premises insured*, shall render the policy void :"—*Held*, that the keeping of small quantities of gunpowder in kegs as part of the stock of goods kept for sale did not vitiate the policy.

Amongst the stipulations of the policy was one, that in case the above mentioned building shall at any time, "be appropriated, applied, or used for the purpose of storing or vending therein" certain enumerated articles, "then, so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no force or effect :"—*Held*, that plaintiff was entitled to recover for a loss by fire of the goods and merchandize insured, although it appeared that a barrel of oil had been temporarily left in a back room of the store, and that near it were some bunches of cotton yarn.

It was part of one of the conditions of the policy that, "if after insurance is effected, the risk shall be increased by any means within the control of the assured, such insurance shall be void and of no effect" :—*Held*, that the increase of risk contemplated was by something permanent or habitual.

BEFORE WARDLAW, J., AT MARLBOROUGH, FALL TERM,
1856.

The report of his Honor, the presiding Judge, is as follows:

"Action on a valued policy of fire insurance to recover for loss by fire.

"The policy was prepared by filling an ordinary blank, which is adapted in many of its terms and conditions to insurance of houses. The insurance here was of a stock of goods in a store-house, which was situated in the country, on a public road, a quarter of a mile from any other building.

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In the store-house, which was not itself insured, there was neither chimney nor stove. It was burnt at night, in the month of January, about the middle of the year for which the policy ran.

"The great question in the case arose from the charge against the plaintiff, made in the defence, that he had himself, fraudulently caused the burning, after removing most of the goods. Upon this question there was a great deal of testimony and discussion. Its decision depended mainly upon the credit which should be given to various witnesses; and the verdict, if not satisfactory to the defendant, is so hopelessly conclusive, that I suppose no further report on this head is required by the appeal.

"It appeared that during the day immediately preceding the burning, there had been a fire out of doors, in the lee of the house and about fifteen feet from it, at which the owner and customers of the store warmed themselves,—that in the afternoon, late, this fire was not visible and was supposed to have been extinguished,—that after dark, a candle was used in the house, and that there was rain early in the night, and snow about two or three o'clock, when the house was discovered to be in flames.

"It further appeared, that, as is usual in country stores, powder was always kept for sale in that store, both before and after the date of the policy. The quantity kept never exceeded two kegs, and the retailing of it was done sometimes from a tin canister—(a customary precaution,)—and sometimes from a wooden keg. In the burning an explosion was heard, which was supposed to have proceeded from the keg then on hand.

"The day before the fire there was in a back room of the store-house, a barrel of oil, which had been got for the painting of the plaintiff's house; and in the same room were some bunches of cotton yarn.

"I submitted all the questions of fact to the jury.

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"I held, that there was nothing in the policy which prohibited the keeping and vending of small quantities of powder, if powder usually formed a part of such a stock as was insured; that in reference to this and to all articles, the insured was bound to use care proportioned to the dangerous nature of the article, and if at any time, there had been on his part, any negligence, or want of customary precaution, from which loss had ensued, the insurer would not be liable for that loss, but that such negligence when it had passed without mischief, did not of itself, discharge the insurer from liability for loss by fire that had proceeded from some other unconnected cause.

"The jury was, in the course of the testimony, informed of the spontaneous combustion which may ensue from cotton and oil brought into contact, but in the summing up, I omitted mention of this matter, because it was not in the note which I had before me, of the objections to plaintiff's recovery that had been made by the defendant's senior counsel, in his opening of the defence, and made again in a very orderly speech pronounced by the defendant's junior counsel, in the final argument. The matter was, however, mentioned in the final speech of the senior counsel, and would have been specially noticed by me, if my attention had been specially called to it. It was embraced in the general propositions which I had laid down, and which I specially applied to the fire that had been out of doors. These propositions were, that some of the specifications of the policy, which are suitable for the case of a house insured, did not apply where only a stock of goods was insured,—that in all cases any increase of the risk by the insured was forbidden; that such increase, if permanent and continuous, took away the benefit of the policy, even although it did not produce the loss; but that an occasional temporary increase of risk took away only the right to complain of loss which it occasioned, and did not affect the right to recover for a loss with which it was in no way connected.

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"The jury found for the plaintiff the value insured."

The defendant appealed, and now moved this Court for a new trial, on the grounds:

1. Because the jury were instructed, that the keeping of powder, in kegs, did not vitiate the policy, unless the burning of the goods arose from the powder so kept.

2. Because his Honor did not charge the jury, that a barrel of linseed oil, stored in the shed room, in close proximity to bunches of cotton yarn, would vitiate the policy.

Dudley and Johnson, for appellants.

J. A. Inglis, contra. If the house, which the plaintiff occupied as a store, had been insured, and had been used for the purpose of storing or vending gunpowder, &c., as a business, there would be reason to say, he could not recover, for its destruction by fire. But the keeping such articles in ordinary quantities as parts of a general stock of merchandize, in such building, is not within the intention of the prohibition. Otherwise, "china, earthen or glass-ware," "looking-glasses," "tallow," "tar," "window-glass," "paper-hangings," "pictures," "prints," "chip or grass hats," &c., in ever so small quantities, kept as part of such a stock would avoid the policy. Such a construction would be unreasonable, and is contrary to the authorities. *Moore vs. Protection Ins. Co.*, 29 *Maine R.* 97; *Grant vs. Howard Ins. Co.*, 5 *Hill* 10; *New York Equitable Ins. Co. vs. Langdon*, 6 *Wend.* 628; *Rafferty vs. New Brunswick Co.*, 3 *Harr. N. J.*, 480; *Dobson vs. Sotheby*, 1 *Mood. and Malk.* 90. (22 *Eng. Com. L.* 260.)

2. Linseed oil and cotton yarn, separately or together, are not among the prohibited articles. "When certain trades or

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occupations, or certain uses of buildings, or kind, or classes of property, are enumerated as hazardous, &c., the rule, "Expressio unius, exclusio alterius," is applied and sometimes with severity." *Parson's Merc. Law*, 498; *N. Y. Equitable Ins. Co. vs. Langdon*, 6 *Wend.* 623-7; *Baker vs. Ludlow*, 2 *Cuines*, 288.

3. These prohibitions in their design and by their terms apply only to cases of insurance on *buildings*. The present claim is for the insurance of a stock of goods—the ordinary stock of a country store, consisting to a large extent, in its nature, and, in the present instance, in point of fact, at the time of insurance, of these very prohibited articles—gunpowder among them. The written application, filed in the office, must have described the stock, but it is not produced.

4. As to increase of risk, the destruction must have been produced by the increased risk, or the change occasioning the increase, must be permanent. The linseed oil was not kept for sale, it was got for his own use, and was at the store temporarily only. *Lounsbury vs. Protection Ins. Co.*, 8 *Conn.* 468; *Dotson vs. Sotheby*, 1 *Mood. and Malk.* 90; *Shaw vs. Robert et al.* 6 *Adol. and El.* 75; *Williams vs. N. E. F. Ins. Co.*, 31 *Maine* 223; *Billings vs. Tolland Co. Ins. Co.*, 20 *Conn.* 139; *Boatwright's Case*, 1 *Strob.* 284; *McMillan & Ewart vs. Union Ins. Co., Rice*, 248.

5. Negligence on the part of the assured or his servants occasioning the loss, is no defence for the underwriter. *Angell on Fire and Life Ins.*, sec. 122, 5, 9; *Catlin vs. Springfield Fire Ins. Co.*, 1 *Sumn. U. S. R.* 434, 443; See also, *Dotson vs. Sotheby*; *Shaw vs. Robert*; *Williams vs. N. E. F. Ins. Co.*, above cited; also, *Pars. Mer. L.* 527.

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The opinion of the Court was delivered by

WARDLAW, J. There was no direct evidence concerning the origin of the fire. The mass of testimony, much of it contradicted, which the defendant introduced to show circumstances from which the plaintiff's fraudulent agency in the burning might be inferred, has been weighed by the jury, and on the facts of the case the verdict is considered conclusive.

The defendant now holds up the written contract, and insists that the plaintiff's rights have been defeated; first, because gunpowder was kept in the store-house, and was sometimes sold from wooden kegs; and second, because oil was in the store-house at the time of the burning, and near to it was some cotton yarn.

By the first of the conditions of insurance it was required, (after mention of what applications for the insurance of *buildings* should specify,) that the application for insurance should specify, "*in case of goods and merchandize*, whether or not they are of the description denominated hazardous, extra hazardous, or included in the memorandum of special rates: and a false description by the assured of a building *or its contents* shall render absolutely void a policy issuing upon such description." In other parts of the appendix to the policy, lists are given of goods denominated not hazardous, hazardous, and extra hazardous, and of those subject to special rates; the not hazardous being such as are *usually kept* in dry goods stores, including coffee, &c. But neither of the lists contains gunpowder. The fifth of the conditions contains this: "the keeping of gunpowder for sale or on storage, *upon or in the premises insured*, or the lighting of the same by camphine or spirit gas, without written permission in the policy, shall render it void."

The first thought naturally is to look at the plaintiff's application. But it has not been produced. The insurance seems to have been effected at Fayetteville, N. C., by an agent

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of the plaintiff applying to an agent of the defendant keeping an office there; the former deposes that, as he believes, he made a written application; the latter deposes that he can find no application of the plaintiff on the file, and believes none was made in writing, but feels sure that nothing special was contained in the application that was made. The policy however declares that the company in consideration of thirty dollars to them paid, "do insure William L. Leggett against loss or damage by fire to the amount of two thousand dollars on his stock of goods and merchandize, contained in his store in Marlborough District, S. C., as particularly described in his written application on file of this date, which is hereby made a part of this policy." It is then contradictory of the defendant's earnest appeal to the letter of the contract, to say that there was no written application, or that its contents have been shown to be either "goods such as are usually kept in dry goods stores," or goods such as were in the store-house without any special description.

If we assume that the application described the goods as they really were, powder was mentioned; or if we assume the description to have been that of an ordinary stock in a country store, then the evidence, sustained by the verdict under the instructions that were given to the jury, shows that gunpowder was included. But adopting the latter assumption, the defendant says that the keeping of gunpowder was forbidden by the policy. How? The condition, concerning what the application in case of goods and merchandize shall contain, did not require the mention of gunpowder, for it is not enumerated as either hazardous, extra hazardous, or subject to special rate. (*Duncan vs. Sun. Fire Ins. Co.*, 6 Wend. 495.) It was not kept "upon or in the premises insured," for the *premises* (by which, as the context shows, was meant some building,) were not insured at all. This strictness is conformable to what has been urged on the part of the insurers, and is justified by the general rule which requires all conditions

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to be construed strongly against those for whose benefit they were reserved. If, however, the store-house had been insured along with an ordinary assortment of goods and merchandize, such as are usually kept in a country store, we would enter into inquiries which this case does not demand, before we would hold that the retailing within the store-house of gun-powder, kept in no large quantity, necessarily made void an insurance under the fifth condition above recited. (See — vs. *Mechanics' Fire Ins. Co.*, 2 Hall, N. Y., 490; *Langdon vs. N. Y. Eq. Fire Ins. Co.*, 2 Hall, 226; 6 Wend. 623.)

Concerning the oil, the defendant refers to a stipulation in the policy, "that in case the above-mentioned *building* shall, during the continuance of this insurance, be appropriated, applied, or used, to and for the purpose of storing or vending therein, any of the articles, goods, or merchandize, in the conditions aforesaid, denominated hazardous, extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed to by this company in writing and added to or endorsed upon this policy, then and from thenceforth, *so long* as the same shall be so appropriated, applied or used, these presents shall cease and be of no effect: and this policy is made and accepted, with reference to the conditions hereto annexed, which are to be used and resorted to, in order to explain the rights and obligations of parties, in all cases not herein otherwise specially provided for." Reference is also had to the latter part of the first condition. "If, after insurance is effected, the risk shall be increased by any means within the control of the assured, such insurance shall be void and of no effect."

The complaint made in the second ground of appeal, seems to be, that the Judge did not, in his summing up, specially advert to the danger which was occasioned by the oil situated as it was. That omission might have been easily corrected by a suggestion from the counsel of the defendant. The oil and cotton, were, however, substantially embraced in the

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instructions that were given to the jury, whether their being in the store may be considered, in reference, either to the stipulation in the policy, or to the above recited clause in the first condition.

It was not suggested on the Circuit that the fire did actually proceed from the oil and cotton, for there was no evidence of their contact or very dangerous proximity, and such suggestion would have weakened the main defence, that the plaintiff had himself caused the fire by means far more speedy and certain. But the breach of condition made by the oil was intimated on the Circuit, and has been pressed here.

The express stipulation in the policy itself, is by its terms confined to the case of a *building* insured, and in reference to that, forbids the appropriation, or chief use of the building, for any of the forbidden purposes, not the incidental keeping of small quantities of the forbidden articles for retail along with a general stock of goods. (See the case of *Langdon* above cited; 3 Kent's Com. 373; 5 Hill, N. Y. 10.)

If a barrel of oil temporarily kept in the house which contained the goods insured, suspended the policy, under the stipulation, then according to the same reasoning the keeping of any of the following articles, (and, perhaps, any of many others,) would have the same effect: any china, or earthen, or glass ware, or looking-glasses, or window-glass, or millinery, or flax, or wool, or saltpetre, or sulphur, or tallow, or straw hats, or matches, or pictures, or confectionery, or jewelry, or perfumery, or stationery, or spirituous liquors, or spirits of turpentine, or varnish. Without any of these articles a country store would hardly be deemed to have a sufficient assortment.

The increase of risk contemplated in the first condition, is the increase by something permanent or habitual. (6 Adolp. & Ell. 75; 33 Eng. C. L. R. 12, *Shaw vs. Roberts*; 31 Maine, 228; 20 Conn. 139.)

In *Dotson vs. Sotheby, et al.*, 1 Moody & Malk. 90, 22 E. C.

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L. 260, a barn that was insured required tarring, and for the purpose of tarring it, a fire was lighted inside, and a tar-barrel brought in. In the absence of the assured, and by the negligence of his servant, the tar boiled over and took fire, in consequence of which the building was burned down. Lord Tenterden held the insurers liable, understanding the condition against fire and hazardous goods, as forbidding only the habitual use of fire or ordinary deposit of hazardous goods, not their occasional introduction for a temporary purpose connected with the occupation of the premises. It is obvious that in the instructions which were given to the jury in the case we are considering, there was an error, of which the plaintiff, in another event of the case, might have had reason to complain. Gross negligence is equivalent to evil design; but ordinary negligence is the very thing against which insurance is mainly intended to guard, and even if the loss should have proceeded from it, the right of the insured is not thereby affected. In this policy the certificate of loss is required to exclude the suspicion of fraud, but not of negligence. If greasy cotton had been put into a corner of the store, by the plaintiff himself, in ignorance of the danger thus occasioned, or in inattention to it, but without evil design, and combustion had thence ensued, the case would not have been less strong for the plaintiff than it now is.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

State vs. Tindall.

THE STATE vs. SAMUEL S. TINDALL.

The affidavit of a juror imputing misconduct to himself and his fellows in the jury room, will not be heard on a motion for a new trial.

Defendant was convicted of murder and moved for a new trial on the ground that testimony taken at the inquest being in the record, was accidentally in the jury room during their deliberations :—Motion refused, it not appearing, by competent evidence, that the testimony was read by the jury, and the Court thinking, that, if read, it added nothing to the strength of the evidence given before the jury.

BEFORE GLOVER, J., AT SUMTER, FALL TERM, 1856.

This was an indictment for the murder of the prisoner's wife. In his report of the case, his Honor, the presiding Judge, after a full statement of the evidence, says,

"Having called the attention of the jury to the evidence, I instructed them, that if they believed the statement of the prisoner, it was an act of suicide on the part of the deceased, and they should acquit him; but, if they believed that the prisoner struck the fatal blow with the knife, he was guilty of murder, as I did not see in the evidence any circumstance which would justify, excuse, or mitigate his offence.

"The inquisition, taken before the Coroner, was not offered in evidence, nor do I know how it got into the possession of the jury, except under the envelope of the indictment, nor how far, if at all, it influenced their deliberations or decision.

"The jury found the defendant guilty, and the next morning, when the Court met, the defendant's counsel stated, in the presence of the jury, what is relied upon in the second ground of appeal."

Columbia, November and December, 1856.

The prisoner appealed and now moved this Court for a new trial on the grounds :

1. Because his Honor charged the jury that if they found the defendant guilty, it must be of murder.

2. Because the record of the Coroner's inquest (which was inadmissible as evidence) was handed to the jury, with the indictment, when they retired to their room, and was before them during their deliberations.

3. Because the verdict was against the law and evidence.

Moses, Edwards, for appellant.

Fair, Solicitor, contra.

The opinion of the Court was delivered by

O'NEALL, J. None of the grounds taken for the prisoner have at all affected this Court, except the second. The guilt of the prisoner is too manifest to raise a question upon the Judge's charge, or the facts. If the facts proved were believed, as unquestionably they must be, the prisoner must be regarded as covered all over with the blood of his unoffending wife. How could a jury find any other verdict, if they believed the evidence, than "guilty of murder?"

Upon the second ground, we have first to remark that we never listen to the affidavit of a juryman ascribing misconduct to himself, or fellows, in the jury room. *Smith vs. Culbertson*, 9 Rich. 106. That being excluded, the next evidence, that the jury had the record of the inquest, is the certificate of the clerk. We think, he had no business to give such a certificate :

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he has enough to do to attend to his duties, without furnishing *ex parte* certificates. If he is to be heard upon such a matter, it must be by affidavit. The solicitor, however, admitted *here* that the inquest went to the jury by accident: and so we must regard it.

That the testimony was abundantly more satisfactory of the defendant's guilt on the trial, than the record of the inquest furnishes, is clear. To give a new trial on the second ground must be in obedience to some stern principle of law, and not on account of right.

I have examined closely the question, and I think there is no such principle.

I agree with what is said by that eminent jurist, Judge Lumpkin, 7 Geo. Rep. 294, in *Killen vs. Sistrunk and Wife*, "So where a paper which is *capable of influencing the jury*, on the side of the prevailing party, goes to the jury by accident, and is *read by them*, the verdict will be set aside, although the jury may think they were not influenced by such paper, it being impossible for them to say what effect it may have had on their minds. If it was not read, it is the same thing as though it had not been delivered." In this case, I do not think the inquest added a tittle to the proof which the jury had before them. So too we must say, that we do not know that it was read. For the affidavit of the juror cannot be heard.

C. J. Hale tells us in his *Pleas of the Crown*, 2 Hale 306, "If a juryman have a piece of evidence in his pocket and after the jury sworn, and gone together, he sheweth it to them, this is a misdemeanor fineable in the jury, but it avoids not the verdict, though the case appears on the examination." If this be not ground for a new trial, I am sure the accidental circumstance that the inquest was in the record is no ground whatever.

The day is I think past when jurors in a case of life and death would be influenced by matters not in evidence, against

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the prisoner. They might thus find reasons to excuse an acquittal. I think, therefore, this verdict ought to stand, and judgment with its dreadful penalty should follow.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF APPEALS OF SOUTH CAROLINA.

Charleston—January Term, 1857.

JUSTICES PRESENT.*

HON. JOHN B. O'NEALL,
" DAVID L. WARDLAW,
" THOMAS J. WITHERS,

HON. JOSEPH N. WHITNER,
" ROBERT MUNRO.

W. A. GOURDIN vs. J. H. READ, JR.

Where in debt on bond, the jury, in finding for the plaintiff on the general issue, assess the damages, as under our practice is proper, and allow the plaintiff only the principal sum due, but not the interest, to which he is also entitled, his only remedy is by appeal. Judgment for the interest *non obstante veredicto*, will not be allowed, nor can he collect it by marking it for collection on the *fi. fa.*

Where, by not giving notice in time, a plaintiff has lost the right of appeal from the verdict, he cannot on his appeal from the decision of a Judge refusing a motion for leave to enter up judgment *non obstante veredicto*, move for a new trial.

BEFORE O'NEALL, J., AT CHAMBERS, CHARLESTON,
JANUARY, 1856.

The facts of this case are stated in the reports of the same case in 6 Rich. and 8 Rich. It was tried before O'Neall, J., at

*HON. THOMAS W. GLOVER, absent, holding the Circuit Court for Charleston.

Gourdin vs. Read.

Georgetown, Fall Term, 1855, when a verdict was rendered for the plaintiff for \$1,887.82, the principal sum due the plaintiff. The jury did not allow interest. The defendant gave notice of appeal, and afterwards withdrew it.

The motion now made was by the plaintiff for leave to enter up judgment for the penalty, and issue execution for the sum assessed with interest. This motion his Honor refused. His report, on the plaintiff's appeal from such refusal, is as follows:

"In this case, which was an action of debt on a penal bond, the jury found the factum of the bond, and assessed the damages of the plaintiff at \$1,887.82, without interest.

"The motion before me, is to enter up judgment, *non obstante veredicto*, for the sum of \$1,887.82 with interest from the time the notes given by Commander to the plaintiff were due, and to secure the payment of which, the bond of Commander and Read, in a penalty of \$5,00, and conditioned to pay the same, was delivered to the plaintiff as collateral security. The parties have also agreed to consider the case under this motion, as if the judgment was entered for the penalty, and the execution marked \$1,887.82, with interest from the 20th day of April, 1850, to be collected; and that this was a motion to strike out that portion which directs the collection of interest, as contrary to the verdict.

"I have struggled to reach a conclusion which would authorize the plaintiff to collect the interest; but I have been able to find no precedent for such a decision. If this were a motion for a new trial before the proper Court, there is no doubt that it must be granted. But the parties have acquiesced in the verdict below. I think I cannot look behind the verdict, and that I am bound to regard it as the proper assessment of damages under the condition. I therefore dismiss the motion to enter up the judgment *non obstante veredicto*, and grant that to strike out the mark on the execution, so far as it directs the collection of interest."

Charleston, January, 1857.

The plaintiff appealed on the grounds:

1. That if the defendant had confessed by his plea that the bond was his deed, and had pleaded in bar of the action, the facts as they appear on the Judge's notes, and a verdict had been found in favor of the plea, it would have been a clear case for judgment *non obstante veredicto*.

2. That the only fact submitted to the jury was the making and delivery of the bond to W. A. Gourdin, and that the further finding of the jury is beyond their authority, being upon a matter not in issue.

3. That if there is any doubt of the meaning of the jury, it must be removed by the Judge's notes, which show that they have undertaken to find that the principal of a note over-due, secured by a bond, does not bear interest.

4. If the appeal from the decision of his Honor on the motion to enter up judgment for the penalty, and to issue execution for the principal and interest due be refused, then the plaintiff will move for a new trial, on the ground that the construction of a written instrument belongs to the Court; that the jury have found a verdict on a matter which they had no right to do; that they have construed the instrument wrongly, and that no presumption can reconcile their verdict with the evidence.

Petigru, for appellant.

Mitchell, contra.

CURIA, PER O'NEALL, J. In this case, I have seen no reason to alter the opinion expressed on the rule.

It is true the plea of *non est factum*, merely puts in issue the execution and legal validity of the bond.

Gourdin vs. Read.

But our practice has become inveterate to assess the damages on the condition of the bond at the time the factum is tried and established.

It is a very convenient practice, and ought not to be disturbed.

In this case the jury ought to have found the interest, but having refused to find it, it follows that the plaintiff's only remedy was by a motion for a new trial *on that ground*. But he failed to give notice properly, and is thereby concluded.

He cannot make that ground on the appeal from my decision, on the rule.

The motion is dismissed.

WARDLAW, WITHERS and WHITNER, JJ., concurred.

Motion dismissed.

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BRADFORD, PATTON & CO. *vs.* SOUTH CAROLINA RAILROAD COMPANY.

Action against the South Carolina Railroad Company as joint contractors with the Western and Atlantic Railroad Company and the Georgia Railroad Company for damage to cotton shipped, in November, 1852, at Chattanooga, and transported over the three roads to Charleston. In 1849, the South Carolina Railroad Company published a notice by which they made themselves liable as joint contractors with the other roads named. On the first October 1852, they published another notice, that they would be liable for damage to cotton "after it came into their possession, but no further." The receipt given by the Western and Atlantic Railroad Company, at Chattanooga, stated, that the cotton "was consigned to the Railroad agent at Augusta," for the plaintiffs in Charleston—"Roads liable for such injuries only as shall be established to have occurred while in their possession." *Held*, that defendants were not liable as joint contractors, and non-suit ordered.

BEFORE O'NEALL, J., AT CHARLESTON, SPRING TERM,
1856.

The report of his Honor, the presiding Judge, is as follows:

"This was an action brought to recover damage and loss on cotton, (say seven thousand one hundred and eighty-six pounds,) received per the defendant's road, in Charleston. The action sought to charge the defendant as a joint contractor with the Western and Atlantic Railroad and the Georgia Railroad.

"On the 22d October 1849, an advertisement was published by the South Carolina Railroad Company, that cotton would be received at Chattanooga, and transported over the Western and Atlantic Railroad, the Georgia Railroad, and the South Carolina Railroad, on a through ticket for sixty-five cents per one hundred pounds.

"On the 1st October, 1852, the South Carolina Railroad

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Company published another notice, "that from and after the date the company will receive at the Georgia Railroad depot, in Augusta, all cotton, produce or merchandise, brought down by the Georgia and other railroads, and intended for the South Carolina Railroad," "the freight and charges on which they will pay up to that point, and collect the whole freight and charges as agreed above, on delivery in Charleston." "Duplicate receipts," the advertisement stated, "would be given by the agent of the company, on the receipt of such cotton, produce or merchandise, at the Georgia Railroad depot, one of which will be given to the Georgia Railroad Company, and the other will be forwarded to the consignee in Charleston, and *for all loss or damage that may occur to such cotton, produce or merchandise after it came into their possession, the South Carolina Railroad Company will be responsible, and will promptly pay, but no further.*"

"The cotton, in this case, was delivered the 23d and 26th November, 1852, to the Western and Atlantic Railroad at Chattanooga, and receipts signed by the agent *there*, which stated that the cotton "was consigned to the railroad agent at Augusta," for the plaintiffs in Charleston. Expenses to be collected at destination, one hundred and forty-two dollars and sixty-two cents. The receipt also stated, "to be transported, in turn, over the Western and Atlantic Railroad to Atlanta, and delivered to the agent of the Georgia Railroad under the following stipulations, viz:—*Roads liable for such injuries only, as shall be established to have occurred while in their possession. Liability of roads, either for damages or loss, not to attach until the cotton is laden on the cars, and to cease on the unloading of the same at its destination.*"

"Parcels of the cotton were marked on each receipt, as in bad order.

"The cotton, when it reached Charleston was found to be damaged; the bales injured appeared to have been under water; the bales were coated with mud. The damage was

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ascertained by a survey to amount to, I think, seven hundred dollars and fifty-three cents.

"The term 'bad order,' the witness said, applied to the outward condition of the bales, and was used capriciously, the cotton so marked being often found to be in good order.

"Where the damage to the cotton occurred did not appear; neither did it appear that the South Carolina Railroad, at Augusta gave duplicate receipts, as pointed out in their advertisement.

"The defendant, on the closing of the plaintiffs' case, moved for a non-suit, on the ground, that there was no joint contract proved. I thought it was best, that the case should go to the jury, so that the whole controversy might be ended by the decision of the Court of Appeals.

"I thought *then*, and still think, there was not the slightest evidence of a joint contract. Indeed the receipts given at Chattanooga showed, without resorting to the defendant's second advertisement, which came out in the defence, that the contract was several and not joint.

"The jury found for the plaintiffs the whole damages claimed, making no deduction for the cotton marked in the receipts, in '*bad order*.'"

The defendants appealed and now renewed their motion for a non suit, on the ground, that there was no proof of a joint contract; and failing in that motion, then for a new trial, on the grounds—

1. That there was no proof of a joint contract.
2. That the notice published by the defendants (1st October, 1852,) the alteration in the language, and legal effect of the receipts given at Chattanooga—the limitation by notice of the responsibility of each road to its own limits—the interposition of an intermediate consignee at Augusta—and the absence of all proof of a "through ticket," or "freight in solido," clearly

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established the contract to be several and not joint, and the jury should so have found.

3. That the damages are excessive, no allowance being made for cotton found to have been damaged at the time of its shipment.

4. That the verdict is contrary to the law and the evidence.

Conner, for appellants.

Memminger, contra.

The opinion of the Court was delivered by

WHITNER, J. Although the motion for non-suit was refused on the circuit, we are informed by the Judge that the case was sent to the jury only that the controversy might be ended by the decision of this Court. By a recurrence to the brief, it will be seen this is not a case in which the party defendant is at all prejudiced by the verdict, hence the motion for a non-suit is very properly renewed.

The ground on which this motion rests will be first considered, whether there was proof of a joint contract on which the action can be sustained.

I shall not encumber the opinion I propose to submit with a transcript of the advertisements of 22nd October, 1849, and 1st October, 1852. The former is set forth in the case of *Bradford vs. South Carolina Railroad Company*, 7 Rich. 201 ;—The latter in the brief of the present case. In the case cited a recovery was had, and sustained by this Court, against the defendant on a *joint contract* for damage to cotton shipped by the plaintiffs under the arrangement made by these three Railroad Companies, as shown by their advertisement of 22d

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October, 1849, and receipts taken and forwarded according to the terms of that notice.

This case was elaborately argued and considered, and the grounds on which the judgment rested are very fully presented in the opinion delivered.

The complexities arising under this arrangement, soon suggested a change as indispensable, and hence, doubtless the subsequent advertisement of 1st October, 1852; and though this proceeded, as it appears, from the South Carolina Railroad Company alone, other facts brought to view in this case, disclose, that the other companies have taken like action. The terms of the latter notice very fully indicate the purpose of the South Carolina Railroad Company to disentangle itself at least from this arrangement, and to break up the previous mode of conducting their business. They thereby announce that henceforth they will receive at the *depot in Augusta* all cotton, produce, or merchandise brought down by the Georgia or other Railroads, and intended for the South Carolina Railroad; that they will pay the freight and charges to that point, and charging these expenses forward, will collect the whole freight and charges on delivery; that they will give duplicate receipts and be responsible for all loss and damage that may occur after the articles for transportation came into their possession, *but no further*. The elements of a joint contract, ascertained and brought to view in the judgment of the Court before referred to, in the former advertisement, are all withdrawn by the latter, consequently one making a shipment on the faith of any undertaking contained in the former notice, or of any information imparted thereby, would appeal in vain to the Court to hold this Company jointly liable, in consequence of either ingredient to be found in the latter notice.

But the motion for non-suit may not be authorized upon this view alone, as a question is suggested whether in point of fact a knowledge of the change in the mode of doing business had been brought home to the plaintiffs. However this

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might be, we are relieved from all embarrassment and misgiving on that subject. As a part of their case, the plaintiffs produced, as was necessary to an exact ascertainment of the thing to be done, the receipt given at Chattanooga, November 25, 1852. These contracts of affreightment are not only subsequent in point of time to the latter notice of the South Carolina Railroad Company, but they speak a language not to be mistaken. They are explicit in all respects, and show very conclusively who were the original contracting parties, the duties to be performed, and the liabilities incurred. No construction to be given can include the present Company as in any way a party to these contracts. They furnish satisfactory evidence that the other Railroad Companies had concurred in dissolving the tie by which they had been previously united with the South Carolina Railroad Company, and that those with whom they dealt in the present instance recognised the dissolution, and entered into the contract with full knowledge. In our judgment there is no evidence on which to charge this Company in the present form of proceeding. In the former case, the evidence was in part written, and in part oral, and hence was properly submitted to the jury. In this case there is no dispute about the facts being entirely derived from the sources already enumerated. There is therefore no purpose to be answered by sending the case back, or by considering the other questions raised in the grounds for a new trial.

The defendant was entitled to the motion for non-suit on the circuit. The verdict is therefore set aside and a non-suit ordered.

O'NEALL, WARDLAW, WITHERS, and MUNRO, JJ., concurred.

Motion granted.

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came to the Ridgville Station, where the road crosses the Railroad track. The crossing was obstructed by a train of cars on the turn-out. The horse wandered up and down the track, until the night cars came up, about 11 o'clock, P. M. and killed him. There was some evidence, from the tracks of the horse, that he had been chased for some distance by the cars.

"The testimony of Magil was, 'that he had hitched the horse, that he had broken loose, and that he was unable to retake him.'

"The defendants moved for a non-suit, on the ground stated in the grounds of appeal.

"The motion was refused.

"The defendants introduced no evidence, and the case was submitted to the jury under the following instructions:—That under the authority of *Danner's* case, 4 Rich. 329, it was only necessary for the plaintiff to prove the fact of the killing by the Railroad Company, and that thereupon a presumption of negligence arose which the defendants must rebut. That as the injury was committed by them, their agents and servants were the only parties who could furnish the requisite information, and that their absence raised a strong presumption against the defendants.

"The Counsel for the defendants had taken the position in his argument that the Railroad track was the property of the Railroad Company, and any intrusion upon it was a trespass, or at least such an intrusion as made the owner of the cattle intruding, liable for all accidents resulting from the intrusion. I instructed the jury that by the law, cattle had the right to wander upon the unenclosed portions of the Railroad track, and that if injury occurred to them from the Railroad Company, or their agents, they must show that the injury occurred without negligence on their part."

The defendants appealed, and now in this Court renewed

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their motion for a non-suit, on the ground, that the plaintiff did not prove due care on his part, and negligence on the part of the defendants.

And also moved for a new trial on the following grounds:

1. Because his Honor charged the jury that the defendants were liable unless they discharged themselves, and that a strong presumption arose against them, from the absence of their servants or agents.

2. That his Honor charged the jury that cattle have the right by law to wander upon the Railroad track, and that the Railroad Company are liable for injuries occurring to such cattle.

3. Because his Honor refused to charge the jury (as requested) that although it might not be a trespass for the cattle to wander, still their so wandering was at the risk of the owner, who must bear the loss arising from any *accidental* injury to such cattle.

4. That there was no proof of negligence on the part of defendants, and that plaintiff did not prove due care on his part to avoid or prevent the injury.

Conner, for appellants, submitted.

1. That by reason of the difference of facts, the rule in *Danner's* case is inapplicable to the present case.

2. That in *fact*, there was no negligence on the part of the defendants, and *in law*, no ground for the rule that the killing is *prima facie* evidence of negligence, casting on the defendant the *onus* of rebutting it. 1 Green. Ev. § 33; *Zemp. vs. R. R. Co.* 9 Rich. 89.

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3. That in actions on the case the plaintiff must be without fault.

Butterfield vs. Forrester, 11 East, 60; *Illedge vs. Goodwin*, 5 C. and P., 24 E. C. L. R. 520; *Pluckwell vs. Wilson*, 5 C. and P., 24 E. C. L. R. 612; *Bush vs. Brainard*, 1 Cowen, 78; *Brownell vs. Flagler*, 5 Hill, N. Y. 282; *R. R. Co. vs. Sineath*, 8 Rich. 191; 5 Denio, 255; *N. Y. & Erie R. R. Co. vs. Skinner*, Law Register.

4. That the plaintiff's horse was trespassing.

1 Amer. Railway cases, 212 (note); *Blythe vs. Topham*, Cro. Jac. 158; 1 Cowen Reports, 91 (note); *Leseman vs. R. R. Co.*, 4 Rich. 413; *Danner vs. R. R. Co.*, 4 Rich. 329; Co. Litt. 56, a, § 68.

Pressley, contra.

The opinion of the Court was delivered by

WARDLAW, J. Beyond the statements of the report, it appears to this Court that the meeting-house where the horse was hitched, was four or five miles west of the railroad: that the road which the horse followed was a public road: that there is on the railroad a deep cut at the crossing of the public road, and for a considerable distance above and below it, the crossing being made practicable by cutting down, at that point, the banks on either side: that the train of cars, which obstructed the crossing, was a freight train, that had early in the evening stopped for the night: and that the passenger train, which killed the horse, seemed, so far as could be judged from the foot-prints of the horse, to have passed the turn-out without slackening speed, and to have overtaken the horse running briskly.

The fence law, which has prevailed in this State, from a time soon after the distinction between forest and cultivated

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lands was made by the settlements of Europeans, has always required that cattle should be fenced *out*, and not fenced *in*. (See Acts, 1694, 2 Stat. 81; 1827, 6 Stat. 331.) It is not then unlawful for the owner of horses or cows to permit them to go at large, so as to roam upon all lands, of his own or of others, that are not guarded by a fence such as the law prescribes: and the entry of a horse or cow upon the unenclosed track of the railroad is no trespass. The owner of cattle, who permits them to roam, runs the risk of all damage which they may accidentally receive, and so may sometimes be said to be negligent of his own interest: but he is not guilty of legal negligence such as embarrass his recovery from a person who, through negligence, hurts the cattle.

This Court perceives no negligence then on the part of the plaintiff, to be ascribed to the conduct of his bailee, who, after attempting in vain to catch the horse, that had been fastened in the ordinary way and had escaped, refrained from pursuing him four miles, and allowed him to go at large upon the public road that led to his stable.

The Court acquiesces too in the reference which the Recorder made to *Danner's* case, for the presumption which arises from the killing of the horse by a train of cars, established and unexplained, and for the unfavorable inference raised by the absence of all the defendant's agents who were at the killing. Negligence, rather than accident, is shown by proof of damage done by a train, when nothing more appears. The nature of the machinery used, and of the railway on which it is used, and the risk which from any obstruction encountered the engineer and all the lives and property under his care necessarily incur, are not of themselves sufficient to rebut the presumption of negligence; but these matters are worthy of much attention, and when strengthened by other sufficient circumstances would avail to rebut. Such other circumstances must usually come from the agents of the Railroad Company, who alone are usually cognizant of them, and in the absence

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of such agents cannot be established by conjecture. In this case, it appeared from the plaintiff's testimony that the killing of the horse was done at night. That of itself is insufficient to show that the killing was accidental. If it had been proved that the night was foggy: that the train was in all respects properly equipped and managed: that the horse suddenly jumped upon the track, or stood still, or was hidden from view by a curve in the road: or in general, that from the time the horse could first have been seen, until he was killed, all proper means and appliances were used to avoid him, and used in vain, a case of accident would have been made out.

But beyond the ordinary presumption un rebutted, it appears in this case that the public road along which the horse attempted to cross the railroad, was obstructed by the company's cars, and that the horse wandered up and down in the cut whose banks he could not climb. The obstruction of the public road was a wrong done by the company, which, under such circumstances would have justly entitled the plaintiff to recovery, even if the killing by the passenger train had been shown to be, so far as that train was concerned, wholly accidental and blameless. The thirty-third section of this Company's charter (8 Stat. 415,) gives to the Company the right to run its track, along or across a public road, only on condition that the road shall not be thereby obstructed: therefore the banks of the cut were sloped at the crossing. The obstruction of the crossing was a nuisance: either the turn-out should have been large enough for the trains which stopped there, to have stood above or below the crossing, or else the cars of a train at rest should have been detached so as to give a free passage. This duty of leaving crossings unobstructed, which both common law and statute require, must be observed by the company, unless it is willing to take all consequences that may ensue from its violation. There is a further duty of slackening speed in passing a turn-out, and still a further one of giving sufficient warning when a

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crossing is approached, (both of which are recognised by the custom of railroads, and we believe by the regulations of this company, and both of which are brought to mind in this case,) which must not appear to have been disregarded in any instance, where the company undertakes to show that all proper means were used to avoid damage complained of.

The motion is dismissed.

O'NEALL, WITHERS and WHITNER, JJ., concurred.

Motion dismissed.

McKenzie, Cadow & Co. vs. Garrison.

McKENZIE, CADOW & CO. vs. JOSINAH P. GARRISON.

The decisions have firmly established that the *undue preference* forbidden by the prison bounds Act, includes the idea of a fraudulent preference. Where a debtor, knowing his insolvency, assigns his estate to some creditors in preference to others, it amounts to an undue preference. Whether a prisoner shall be required to specify the names of witnesses to choses in action included in his schedule, is a matter, it seems, for the determination of the commissioner of special bail.

BEFORE DAVID RAMSAY, ESQ., COMMISSIONER OF
SPECIAL BAIL.

The defendant, J. P. Garrison, a citizen of Florida, was arrested and committed to jail in March, 1856, in Charleston district, under mesne process, at the suit of the plaintiffs, McKenzie, Cadow & Co. On the same day and while in jail, he executed an assignment as follows :

THE STATE OF SOUTH CAROLINA :

Know all men by these presents, That whereas I, Josinah P. Garrison, am indebted to Thomas C. Kettles in the sum of three hundred and fifty dollars (\$350.00,) to David Mizelle in the sum of three hundred and eighty dollars (\$380.00,) to L. Alexander in the sum of five hundred dollars (\$500.00,) to William H. Hall in the sum of seventy-five dollars (\$75.00,) to Samuel Lowman in the sum of five hundred and fifty dollars (\$550.00,) to Doctor George B. Payne in the sum of three hundred dollars (\$300.00,) which indebtedness amounts in all to the sum of two thousand three hundred and fifty-five dollars.

Now know ye, That in consideration of the said indebtedness, I, the said Josinah P. Garrison, do hereby assign, set over,

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convey, bargain, sell and deliver to the said Thomas C. Kettles, David Mizelle, L. Alexander, William H. Hall, Samuel Lowman, Dr. George B. Payne, all my books of account, notes, due bills, and debts due me, and I do further authorize and empower the said Thomas C. Kettles, David Mizelle, L. Alexander, W. H. Hall, S. Lowman and Dr. G. B. Payne to collect the said moneys due me, upon said accounts, notes and due bills, and to do all such acts as may be necessary for their collection as fully and effectually, as I, myself, could do, and to effectuate this instrument I do hereby bind myself, my executors, administrators and assigns firmly by these presents. In witness whereof, I have, this, fourteenth day of March, Anno Domini eighteen hundred and fifty-six, set my hand and seal.

J. P. GARRISON, [L. S.]

Signed, sealed and delivered, in the presence of

EDW. J. ANDERSON,
JOHN H. ELLIS.

On the next day he filed a schedule, containing the following articles:

Household and kitchen furniture.

Wearing apparel of himself and family.

All my interest in house and lot, formerly the property of Joseph Ferguson, in Micanopy, Florida.

Books of account and bills due upon the same already assigned to pay to T. C. Kettles, three hundred and seventy dollars; David Mizelle, three hundred and eighty dollars, Dr. George B. Payne, three hundred and fifty dollars; L. Alexander, five hundred dollars; W. H. Hall, seventy-five dollars; Samuel Lowman, five hundred and thirty dollars.

My interest in store-house, Micanopy, Florida. Land, two hundred and thirty-one acres in Columbia county, Florida.

House and lot in Micanopy, Florida, bounded by lands of J. B. Smith, A. W. Cook and B. Radcliffe.

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And thereupon he applied for his discharge under the prison bounds Acts.

The plaintiffs opposed his discharge and filed a suggestion alleging, that the schedule was illusory and deceptive, because the choses in action were not mentioned with sufficient particularity, &c., and because the names and places of abode of the witnesses to prove the said choses in action, were not mentioned; that the schedule was not true in divers particulars specified; that the prisoner, within three months before and since his arrest and confinement, had made an undue preference,—specifying the assignment to Kettles and others, and charging it to amount to such preference; and, lastly, that the prisoner had fraudulently conveyed and assigned a large part of his estate to defraud the plaintiffs—also specifying the assignment to Kettles and others, and charging it to be fraudulent, and the debts therein mentioned to be pretensive.

The case was tried 17th May, 1856; and the jury after hearing the testimony, several witnesses having been examined, returned a verdict of not guilty.

The plaintiffs appealed, and now moved this Court for a new trial, on the grounds:

1. Because it is respectfully submitted, the commissioner erred in charging the jury, that if the debts due J. C. Kettles and others were bona fide debts, that the petitioner or defendant had the right after his arrest and confinement to make an assignment of his property to J. C. Kettles and others in said schedule mentioned, and thereby to prefer them to the relators, his creditors.

2. Because it is respectfully submitted, that there was no proof that the debts due to J. C. Kettles and others aforesaid were bona fide, and the commissioner should have charged the jury that it was incumbent on the petitioner to prove the consideration and justice of the said debts.

Charleston, January, 1857.

3. Because it is respectfully submitted, that the commissioner erred in not charging the jury, that the schedule of the petitioner was defective in not containing the names and residences of the witnesses, who could prove the accounts in the schedule assigned, or proposed to be assigned by the petitioner.

Mowry, McCrady, for appellants.

Martin, contra.

The opinion of the Court was delivered by

WITHERS, J. After the arrest of the defendant upon mesne process, issued in behalf of the plaintiffs, he made the assignment referred to in the brief, which was to inure to the benefit of certain specified creditors in Florida, leaving for the plaintiffs no more than a residue, after satisfaction of the preferred creditors, if any residue there might be. The schedule, filed for the purpose of seeking the benefit of the Prison Bounds Act, was presented the day next after that of the assignment. The plaintiffs interposed objections, upon suggestion, to the defendant's enlargement, and *inter alia* allege the said assignment to be such preference of one creditor to another, or such undue preference of certain creditors to the prejudice of the plaintiffs as brings the defendant under the condemnation of the seventh section of the Act of 1788, familiarly called the Prison Bounds Act. The jury charged with the issues made upon the suggestion, have found a verdict for the defendant, and this appeal is made for a new trial.

The decisions of this Court have firmly established, that the undue preference, which the law forbids, includes the element of a fraudulent preference—a modification of the rigor of a course of decision in earlier times, a departure

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from the strict letter in favor of a humane interpretation of provisions considered *quasi* penal, an interpretation much commended by considering, that within the specified period of three months a mere preference of one over another creditor, by payment or assignment, might occur with no design to prejudice, defeat, delay, or hinder any creditor, in ignorance of unsettled or complicated affairs, which subsequent current events of the three months might vary, as to results, for the worse as well as the better.

It is clear that an issue as to fraud, involves an inquiry as to intention or design of the party charged, and the jury before whom it is tried must resolve it. But in such issue, as in all others, the verdict for or against either party must have a foundation in the evidence, or it cannot stand. Now if a debtor be insolvent, and he knows it, and yet he will transfer his estate to some creditors, in preference to others, it is manifestly in contravention of the scheme of our legislation in favor of insolvent debtors—which contemplates, on the part of him who appeals to them, a fair and rateable appropriation of his inadequate or insolvent estate to all his creditors. When such a person is in circumstances to know that an assignment to some will defeat others, how can he be held innocent of a purpose to that effect? Such was the case of *Witsel* (vide 2 Hill, 418,) though his obnoxious act was performed before his confinement; such was the case of *Briggs*, who preferred Cathcart, a subsequent suing creditor, to Walker a prior one. We have in this case the circumstances, that the defendant made his preference, by assignment, after his arrest and confinement, in favor of creditors in another State, who did not demand it (so far as appears,) and that what he assigned to them is inadequate to satisfy them, according to defendant's estimate here. As to the real estate set forth in the schedule, the evidence reported is strong to show, that it is merely delusive as a resort for these plaintiffs,

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either because Garrison does not own it, or, if he owns any, that it is of very trifling value.

The position assumed for him is, that he had enough, or supposed he had, of assets to pay all creditors. Then (it may well be demanded) why did he not make all creditors equal under the assignment; and superintend, as he best could do, the adjustment of his affairs? It is much to be apprehended, that if such a transaction as Garrison's be maintained as consistent with the law of insolvent debtors, we shall afford them not merely the benefit of a mitigated and humane exposition of that law, but entirely shield them from all its sanctions, and destroy its whole efficacy towards protecting the rights of suing creditors, who, because they sue, may incur the resentment of their debtor.

Upon the two other grounds of appeal, it is needful to say but little—nothing authoritatively. It may be difficult for one in Garrison's condition, to show much evidence as to the genuineness of his indebtedness to the preferred creditors; to the extent that the assignment may be pretensive, in that respect, it would be evidence of a fraudulent assignment of his estate and effects, and would not avail no matter when made.

As to specifying the witnesses to the choses in action; the fifth section of the Act declares that this "must" be done; but we suppose that the object in view can be secured by the exercise of authority on the part of the Commissioner, according to the circumstances, by denying a discharge without a reasonable compliance with this regulation. It is foreseen that circumstances will arise in the cases of imprisoned debtors, wherein a full compliance, or even a partial one with this provision, may be impracticable.

A new trial is ordered.

O'NEALL, WARDLAW, WHITNER, and MUNRO, JJ., concurred.

Motion granted.

State vs. City Council.

THE STATE, EX. REL. B. MORDECAI and CAPERS & HEY-
WARD vs. THE CITY COUNCIL OF CHARLESTON.

By the charter of the City Council of Charleston, they may impose a tax on slaves brought from other States, into the City for sale.

A tax on slaves brought from other States into this State for sale, is not unconstitutional.

BEFORE O'NEALL, J., AT CHAMBERS, APRIL, 1855.

The judgment of his Honor, the presiding Judge is as follows:

"This is an application for the writ of prohibition, to prevent the enforcement of executions issued by the city council against the relators, to collect a tax of ten dollars per head for the slaves in their respective possession for sale, and brought from other States.

"The Relators are brokers, residing and doing business in Charleston. The slaves supposed to be liable to the tax are in their possession, but are from parts beyond the limits of this State, and are in their hands respectively for sale. The ordinance of the 21st March, 1855, under which the relators are supposed to be liable, is as follows, viz: 'Every slave brought into the city for sale, from beyond the limits of this State, shall be subject to a tax of ten dollars; and it shall be the duty of the city assessor to ascertain the number of such slaves, and assess the said tax on owners or persons in possession of such slaves for the purpose of sale, and hand over such assessment to the city treasurer, who shall forthwith give notice to the said owners or persons in possession, to make payment of the said tax, and on failure to do so, the city

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treasurer shall issue an execution for the amount of the said tax, and lodge the same with the city sheriff, who shall immediately proceed for the collection of the same, in the manner prescribed by the ordinance for the enforcement of tax executions.' Under this ordinance, the relator, Mordecai, has been assessed nine hundred and thirty-five dollars, twelve cents, and an execution has been lodged with the city sheriff, who is about proceeding to collect the same. Capers & Heyward have also been assessed under the same ordinance, but to what amount is not stated; and an execution is about to issue to collect the same.

"The motion has been submitted without any argument on the part of the city.

"I have examined the case, and the argument submitted for the relators, and have come to a conclusion against the power exercised by the city.

"The State, it must be remarked, has not taxed 'Slaves brought into it for sale from beyond the limits of this State.' Indeed, it may admit of a very serious argument, under the fifth paragraph of the 9th Sec., 1st Article of the Constitution of the United States, whether the State could tax slaves brought from another State into this State for sale. Although not within the words, yet certainly it would be a violation of its spirit, if Congress could not impose a tax or duty on any articles exported from a State, and yet a sister State should undertake to exercise that power on property exported from another.

"But this view is unnecessary *here*. Until the State exercises the power of taxing slaves brought into this State for sale, I do not perceive how the city can tax. They are not *eo nomine*, 'taxable property,' and it is only upon such that the taxing power of the city can be laid. The owners of this property are (as I understand the case,) not residents of the city of Charleston—they have merely placed it in the hands of the relators, as their agents for sale.

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"Under the case of the *State, ex relatione Adger vs. the City of Charleston*, 2 Spears, 719, the tax cannot be sustained.

"The motion for the writ of prohibition is therefore granted."

The defendants appealed, and now moved for a reversal of the order for a writ of prohibition.

1. Because it is competent for the State to tax any persons or property within her limits, when not prohibited by the Constitution of the United States.

2. Because the Constitution of the United States has not prohibited a State from taxing negroes brought within her limits and offered for sale.

3. Because the taxing power of the city, under the charter, extends to "the inhabitants of the city, or those who hold taxable property within the same;" and all property therein is "*taxable*" which is not *exempted by law*, from taxation by the State.

4. Because the *forbearance or omission of the State* to tax is different from an *exemption* and does not affect the right of the city to exercise the power.

Porter, City Attorney, for appellants.

J. J. Petigrew, contra.

The opinion of the Court was delivered by

WITHERS, J. The city council of Charleston have passed an ordinance declaring that, "every slave brought into the city, for sale, from beyond the limits of the State, shall be subject to a tax of ten dollars;" and the city assessor is

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required, to ascertain the number of such slaves and assess the said tax "on the owners, or persons in possession of such slaves for the purpose of sale;" and provision is made, in default of payment of the tax, for its collection by execution.

Measures have been taken to enforce this ordinance upon the relators who come within its provisions, and they have succeeded in obtaining a prohibition from one of our brethren, from whose decision an appeal comes up to this Court.

The grounds taken to maintain the motion for prohibition are:

First. That the charter of the city of Charleston does not confer the power to make the ordinance in question.

Second. That, if it does, the same is forbidden by the Constitution of the United States.

First. The charter was granted in 1783; among the inducements to the grant is specified the growing importance of Charleston, in respect to an "extensive commerce with foreign nations." It is enacted that "the said city council shall also be vested with full power and authority, to make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the said city, as shall appear to them expedient." They are restrained from laying "a duty of more than three-pence per ton on any shipping in the harbor;" and all their by-laws, rules and ordinances, are subject to revisal, alteration, or repeal by the legislature.

Whether the tax of ten dollars upon each slave brought within the city for sale, from beyond the limits of this State, be within the power of taxation conferred, depends upon the inquiry, whether such slave be *taxable property* held by one within the city, for if it is such property the council are expressly authorized to tax. It is objected, that such a slave is

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not "taxable property," because the State does not tax it. This view would convert the words "taxable property" into the phrase, property taxed by the State. By such an exposition, the sources of revenue for the city government, would be exceedingly restricted; a multitude of taxes, or assessments, would be swept off at one blow. Although such a result could not serve to maintain an ill-gotten power, yet it suggests an incongruity with the declared functions which the legislative authority expected the municipal corporation to perform, which functions can be collected from the recital of inducements that led to the establishment of a local government. The city of Charleston can tax only property within the corporate limits, and if confined to those species only which the State may happen to tax, then the sources of revenue for the city will vary, from time to time, as the condition of the State treasury and the purposes of State policy may vary; and if the State should happily find its coffers so supplied as to need little or no taxation, the city would be exceedingly pinched in its treasury, let those local and peculiar circumstances and necessities which led to its incorporation, be what they might. In the language of Ch. David Johnson, (*City Council* ads. *The Vestry of St. Philip's Church*, 1 McM. Eq. 148) in contemplating such an event, "Charleston, without the power of taxation must become a waste, and riot and disorder prevade her streets." There seems to be good foundation for the interpretation by Ch. Harper, who represented the Court in the case above cited, (p. 144, 2 McM. Eq.) to wit, "I do not well perceive what definition can be given to the words 'taxable property,' unless they be made to mean *all property not excepted by law from taxation*." Such construction is illustrated by sundry cases in our reports, of recent date, as, for example, *State vs. City Council*, 5 Rich. 564; *Bank vs. City Council*, 3 Rich. 342; *State vs. City Council*, 4 Strob. 217.

It is unquestionable that a very ample power of taxation

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is bestowed upon the city of Charleston as to persons and property within the corporate limits, and it was bestowed by the State in 1788, when it was itself unrestricted, as to the capacity to make such grant. The delegation of the taxing power must have been intended to be commensurate with the scope of the corporate objects and the undefinable and varying exigencies arising within that scope. It was then clearly foreseen, that as population increased and trade with it, the demands for revenue would grow apace; such demands could not have been expected to diminish or expand in correspondence with those of the State at large, and, therefore, it would not be reasonable to subject a power ample in itself, and necessarily regulated by peculiar contingencies, to the exercise of a like power controlled by circumstances, wholly dissimilar. The first objection, therefore, to the tax in question, is not well taken.

The second objection is, that the tax in question, is forbidden by the Constitution of the United States, and reference is made to clause 5, sec. 9, art. 1, of that instrument. It is this, "No tax or duty shall be laid upon any article exported from any State."

There are two reasons why this restriction cannot apply to this case, though one is enough. In the first place, the prohibition is upon Congress, and is by the fair import of the words, and the connection in which they stand, subsidiary to a very important purpose, to wit, to restrain Congress from fostering or oppressing one port or the commerce of one State, to the end of destroying equality and uniformity, as to levies of contributions from foreign commerce. Nor does it follow that a restriction upon the taxing power of Congress, shall operate a restraint upon that great and most necessary power in a State. In the second place, even if we say that neither Congress *nor any State* (and so read the clause) shall lay any tax or duty upon any article exported from that State, then it is plain this would not affect this tax, because it is not upon

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any article exported from South Carolina. It is hardly necessary to observe that, of course, what the State cannot do, no creature that springs from its legislation can do. But it is manifest, that the above recited clause from the Constitution of the United States, does not at all apply to this case, in letter or substance.

The second clause of sec. 10, art. 1, Constitution of the United States, would seem to have a more plausible application to the present case. It is this: "No State shall without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts, laid by any State on imports and exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the congress." Read in connection the clause 1, sec. 8, art. 1, "The congress shall have power to lay and collect taxes, duties, imposts and excises, but the last three to be uniform throughout the United States," and remember, that the federal interest required the revenue from foreign commerce to go into the common treasury, that the non-importing but consuming States, should not be liable to contribute their quota to the federal exchequer, by direct taxation, and also contribute, as importers and exporters through the ports of other States (by a tax or duty laid by those States on imports and exports,) to the treasury of such States, and the object of the restriction above cited is manifest. It will be plainer still, when we remember that if such tax or duty had been left within the power of a State, it might have seriously impaired the source of revenue to the federal treasury, have embarrassed the power of congress to "regulate foreign commerce," which power it has exercised, and have disturbed the fundamental end that all duties and imposts must be uniform throughout the United States.

There are two objections to the applicability of the restric-

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tion under consideration to the tax now in question, which reduced to short propositions are these :

First, the slaves brought from Virginia are not "imports" in the sense of the Constitution.

Second, if they were, the tax imposed, and now resisted, is not a tax on an "import;" for the ordinance imposing it interposes no obstruction to an importation of the slaves, but it levies a contribution, *per capita*, after they are imported, after they have come under the protection of the laws of the State and regulations of the city, free from any protection or authority of the State whence they came, are mingled with the slave population of the city, and held within its corporate limits for sale.

For an elaboration of the argument which sustains these two propositions, it is sufficient to refer to the opinion pronounced for the Court of Errors, at the present term, in the case of *Rhett & Robson vs. H. L. Pinckney*, tax collector.

We forbear any observations upon the question, whether this tax may not be supported upon the footing of an exercise of police power; for we think it fully maintainable upon other grounds set forth.

The motion for a reversal of the judgment awarding a writ of prohibition against the city council of Charleston, is granted.

O'NEALL, WARDLAW, WHITNER, and MUNRO, JJ., concurred.

Motion granted.

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THE STATE, EX REL. EDWARD FROST vs. JOHN D. ASHMORE,
COMPT. GENERAL.

The first section of the Act of 1852, directs in certain contingencies, two subscriptions, of five hundred thousand dollars each, to the Blue Ridge Railroad Company; and the fifth section directs that the whole subscription shall be paid in bonds, to be countersigned by the comptroller general, "which shall be payable in five instalments of two hundred thousand dollars each." But one subscription of five hundred thousand dollars was taken, and the two first instalments of that were paid in bonds of two hundred thousand dollars each, but the last instalment of one hundred thousand dollars, the comptroller general refused to pay because he construed the Act to be imperative and to require each instalment to be for two hundred thousand dollars:—*Held*, that the comptroller general was wrong in his construction of the Act, and that the last instalment, though only for one hundred thousand dollars, should be paid.

BEFORE MUNRO, J., AT CHAMBERS, CHARLESTON,
JANUARY, 1857.

This was a motion for a rule to show cause why a writ of mandamus should not issue commanding the comptroller general, John D. Ashmore, to countersign such bonds as may be requisite to pay the amount of the subscription of the State to the Blue Ridge Railroad Company. The motion was founded upon affidavit as follows:

THE STATE OF SOUTH CAROLINA,
Charleston District.

Personally appeared before me, Edward Frost, and makes oath, that he is president of the Blue Ridge Railroad Company in South Carolina, chartered by the State on the 16th day of December, A. D., 1852; that on the twenty-first day

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of December, one thousand eight hundred and fifty-four, an Act was passed by the general assembly, entitled "an Act to authorize aid to the Blue Ridge Railroad in South Carolina;" the first section of which provides, among other things, that "whenever satisfactory proof is produced to the comptroller general within two years after the passing of this Act, that one million of dollars has been subscribed by responsible persons or corporations to the capital stock of the Blue Ridge Railroad Company in South Carolina, he is authorized and required to subscribe on behalf of the State, the sum of five hundred thousand dollars;" that on the 1st day of July, A. D., 1855, within the two years aforesaid, proof satisfactory to the comptroller general was produced, that the condition specified had been complied with, whereupon he subscribed the sum required by the legislature, to wit: five hundred thousand dollars, and took from the company certificates of such an amount of shares, as the State was entitled to by her said subscription; that the Act aforesaid, further provides by section fifth, as follows, to wit: "That the governor of the State of South Carolina be, and is hereby authorized and directed in the name of the said State, to issue bonds to be countersigned by the comptroller general, not exceeding in all the sum of one million of dollars, which shall be payable in five instalments of two hundred thousand dollars each—the first instalment to be payable after the expiration of twenty years, and the remaining eight hundred thousand dollars in four equal annual successive instalments thereafter: *Provided*, That the governor and comptroller general may pay the aforesaid subscription in cash, or in the above bonds at par, as they shall deem best: *Provided also*, That the interest to be paid on such bonds shall not exceed the rate of six per centum per annum."

And by section sixth, the said Act further provides as follows: "That whenever satisfactory proof shall be produced to the comptroller general, that the sum of two hundred thousand dollars has been paid in by the shareholders, and ex-

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pendent in the construction of the road, he shall pay to the said company on behalf of the State, a like sum of two hundred thousand dollars; and for every like sum so paid in, and expended by the shareholders, he shall pay to the company two hundred thousand dollars, and so on, until the whole subscription of one million dollars shall be exhausted."

That on the first day of July, A. D., 1855, satisfactory proof was produced to the comptroller general, that the sum of two hundred and fifty-seven thousand eight hundred and sixty-five dollars had been paid in by the shareholders, and expended in the construction of the road, and the comptroller general accordingly countersigned certain bonds of the State, issued under authority of the fifth section of the Act above recited, and paid over in said bonds at par two hundred thousand dollars of the amount subscribed by the State.

That on the first day of January, A. D., 1856, satisfactory proof of the payment in and expenditure of the sum of four hundred and ten thousand nine hundred and fifty-three dollars and ninety-three cents was produced to the comptroller general, and bonds to the amount of two hundred thousand dollars more were countersigned and paid over by him. That, as appears from the statement of the treasurer of the company, hereto annexed, more than six hundred thousand dollars in all has been paid in by the shareholders of the company, and expended in construction of the said road. That affiant, as president of the said Blue Ridge Railroad Company, on the day of December, A. D., 1856, applied to the comptroller general, and requested that he would countersign and pay over to him for said Railroad Company, in behalf of the State, bonds to the amount of *one hundred thousand dollars*—that is, the residue of the subscription of the State, remaining unpaid.

That the said comptroller general altogether refused so to do, and still doth refuse, alleging that he is required to make payments in the sum of *Two* hundred thousand dollars at a time, and that the whole balance of the subscription remaining

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due and unpaid, being only *one* hundred thousand dollars, he is not authorized to countersign said bonds, or to pay them over to said company; that in reply to the last application made by letter from affiant, the said officer returns for answer the following letter:

"Anderson, C. H., Dec. 25, 1856.

"Hon. EDWARD FROST,
President Blue Ridge Railroad.

Dear Sir,—Yours of the 17th, postmarked 23rd inst., reached me to-day. It is dated, however, from Columbia, but bears the Charleston post-mark. This, I presume, accounts for the delay. As you request an early answer, I proceed to give it. I have had no cause or reason to change my opinion as to what is my duty in regard to the signing of the bonds for the remaining one hundred thousand, of the first five hundred thousand dollars subscription to the Blue Ridge Railroad; but on the contrary, have had it strengthened by a close examination of the Act granting aid to said company. The fourth section of that Act says, "That the subscription *shall* be paid in the manner, and subject to the terms and conditions hereinafter expressed."

The fifth section, after providing for the issue of bonds in sums of *Two hundred thousand dollars each* in *FIVE equal annual instalments*, goes on to state, by way of proviso, "That the governor and comptroller general *may pay for the aforesaid subscriptions* in cash, or in the above bonds at par, as they shall deem best."

The 6th sec. says, that "Whenever satisfactory proof shall be produced," &c., &c., "he" (the comptroller general) "SHALL pay to the said company, on behalf of the State, a like sum of *two* hundred thousand dollars; and for every like sum so paid in, and expended by the shareholders, he *shall pay to the com-*

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pany two hundred thousand dollars, AND SO ON, until the whole subscription of one million dollars shall be exhausted."

[The Italics are my own.]

"In the fifth sec. provision is made for the payment of these bonds, (to the bond holders,) in sums of *two* hundred thousand dollars each, but there is no provision made for payment in sums of *one* hundred thousand dollars.

"In every instance throughout the whole Act the word "*shall*" is used, which in my judgment is imperative; and again, in every instance where the amount of bonds to be issued, or subscriptions paid, is referred to, the sum of *two* hundred thousand, and not *one* hundred thousand dollars, (as you now ask for,) is used, or understood. This leaves no discretion to the comptroller general, in my opinion; and as I have read and understood the decisions of our judges upon statute law, a strict construction is to be placed upon the letter of the law.

"I may be in error, and if so, I trust the court will correct me. For the reasons assigned, I shall decline signing the bonds for one hundred thousand dollars, until so ordered by the court.

"As I said to you in Columbia, I will waive all irregularities, accept the service of a mandamus left at my office, and enter no defence, beyond what is expressed in this, and desire with yourself a decision, and with as little delay as possible.

"That I may not be misunderstood, [and as I have said, shall not appear by counsel,] I ask the favor at your hands of laying the views herein expressed before the judge and court.

"I am, &c., &c.,

"J. D. ASHMORE,

"Comptroller General."

This refusal affiant verily believes to be contrary to the duty prescribed for said officer in the Act herein before referred to, construed according to its true meaning and intent,

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and is manifestly injurious to the interests of the company over which affiant presides.

Affiant therefore applies for a writ of mandamus directed to the said J. D. Ashmore, comptroller general, requiring said bonds to be countersigned, to the amount of the State subscription still remaining unpaid; and that the same be paid over in behalf of the State to affiant, as representative of the Blue Ridge Railroad Company.

EDWARD FROST,

President Blue Ridge Railroad Co., in South Carolina.

Sworn to before me, this ninth day of January, A. D., 1857.

CH. RICHARDSON MILES,

Not. Pub. Ex-Offi. Magistrate.

His Honor made the following order :

"Upon hearing the affidavit of Edward Frost, president of the Blue Ridge Railroad Company, and representing said company, on motion of the attorney general, It is ordered, that J. D. Ashmore, comptroller general of the State of South Carolina, do appear before the Court of General Sessions and Common Pleas, to be holden at Charleston on the second Monday of January instant, to show cause why a writ of mandamus should not issue against the said J. D. Ashmore, from the Court aforesaid, in behalf of the State, and in the name of the attorney general, commanding the said J. D. Ashmore, comptroller general, as aforesaid, to countersign such bonds of the State as may be requisite to pay the amount of the subscription of the State of South Carolina to the stock of the Blue Ridge Railroad Company; and that said bonds so countersigned, to the amount of the said subscription yet unpaid, shall be paid by him to the said company in behalf of the State, according to the requisitions of the sixth section of the Act, entitled, an Act to authorize aid to the Blue Ridge Railroad Company in South Carolina."

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The respondent appealed.

Because his Honor erred in granting the said order, for the reasons set fourth in the letter of this appellant, recited in the relator's affidavit.

———— for appellant.

Hayne, contra.

The opinion of the Court was delivered by

WITHERS, J. By the Act of 1854, p. 271, two several subscriptions by the State, to the stock of the Blue Ridge Railroad Company, of half a million each, were contemplated, and were authorized to be made by the Comptroller General, upon contingencies specified. In a clause subsequent to that (the first) which authorized the subscription, at two different times, of one million of dollars, a provision (in the fifth clause) is made to raise, on the part of the State, the entire sum by bonds, to be made payable at such periods, that the whole million should be payable in five equal instalments of two hundred thousand dollars, the first to be payable at the expiration of twenty years, and one other annually thereafter. But it was provided, that the subscriptions by the State might be paid in cash, or in said bonds, at the par value, according to the discretion of the Comptroller and the Governor.

It is manifest that this scheme of paying subscriptions to the company, in instalments of two hundred thousand dollars each, and raising the money upon bonds that should become payable in different years, in five several amounts, corresponding to the payments to be made upon subscriptions, were based upon the presumption that the whole million of dollars would be subscribed. It turns out, that but half that sum has been subscribed, and certificates of stock taken for it, and one hundred thousand dollars of that subscription remains

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unpaid, and is refused by the Comptroller General, upon the ground, that as to payments on subscriptions, and as to bonds to be issued for providing the means to make them, two hundred thousand dollars, and not one hundred thousand dollars, are the sums imperatively fixed.

As already observed, this scheme of fixed amounts in five several instalments can refer only to the entire liability for one million. It is totally impracticable when (as is the case) the liability to pay is limited to half a million, and the authority and duty to raise the means extends to no more. It can never be assumed, that the State did not mean to pay, in good faith, the first subscription of half a million, and in full, *pari passu* with other subscribers, upon legitimate calls; or that the State meant to retain one-fifth part of its first subscription until the second, of half a million more, should be made. Suppose the authorized discretion to pay in cash had been exercised to the extent of four hundred thousand dollars, it cannot be supposed that the remaining one hundred thousand dollars would not be payable either in cash or in bonds. In such case it appears to us, that the said one hundred thousand dollars could be raised, according to the true intent of the Act by making the bonds, issued for that purpose, payable at such time as would bring them within that instalment, as to the time of payment, to which they would have pertained, if the scheme of paying a million in bonds, in portions of two hundred thousand dollars each, had been carried out. If that had occurred, the last one hundred thousand dollars of the first subscription, and the first one hundred thousand dollars of the second subscription would have required bonds payable in the same year, although it may have happened that they could not have been issued at the same time.

We think, therefore, the Comptroller General, while he should be held meritorious when guarding vigilantly the treasury of the State, is in error upon the present question;

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and that the relator is entitled to the money or the bonds, to which the law has given him a right, and which has been denied to him.

It has been suggested that the defendant seeks only the judgment of this Court, and as this is an appeal from an order to show cause why a mandamus should not issue, we suppose it to be sufficient to dismiss that motion, and it is ordered accordingly.

O'NEALL, WARDLAW, WHITNER, and MUNRO, JJ., concurred.

Motion dismissed.

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THE STATE *vs.* ISAAC WINNINGHAM AND ROBERT MILLER.

Under the Act of 1731, § 43, a prisoner, indicted for a capital offence, is entitled if he requires it, and upon payment of the fees for copying, to a copy of the indictment three days before his trial. The demand for a copy should be made, at the latest, when he is arraigned, and in open Court.

W., one of five prisoners jointly indicted for murder, upon their arraignment on Thursday, the term being only for a week, said that he was not ready for trial, and insisted upon a continuance, on the ground that he was entitled to a copy of the indictment three days before the trial. His motion to continue was refused, and the five were tried on Friday and W. and M., were found guilty and the rest acquitted:—On appeal, *held*, that what W. did, amounted to a demand of a copy of the indictment, and that he was entitled to a new trial *ex debito justiciæ*.

M., when arraigned made no motion to continue, but moved for and obtained a bench warrant for some witnesses. On Friday he united with W., and the other prisoners in moving for a continuance, on the same ground W. had taken the day before:—*Held*, that M. had waived his right to a copy of the indictment, but, nevertheless, the Court, under the circumstances, granted him a new trial, *ex gratia*.

BEFORE O'NEALL, J., AT COLLETON, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"The prisoners, with four other persons, viz: Nathaniel Bowman, William Murray, James Miller and Richard Williams, were indicted for the murder of a slave, named James, the property of Col. Lewis Morris.

"The indictment was found on Wednesday; on Thursday, the prisoners were put to the bar, and arraigned. For the prisoners Robert Miller, James Miller, William Murray, and Richard Williams, Messrs. Perry and Williams appeared. For Nathaniel Bowman, Col. Carn appeared. Winningham was without counsel: I assigned to him, Messrs. Youmans

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and Williams of Beaufort district. The prisoners all pleaded not guilty. The four first named, on being asked if they were ready for trial, moved for, and obtained a bench warrant against some absent witnesses. Bowman's counsel desired another day to be assigned for trial. Winningham said he was not ready: and his counsel presented for a continuance, the ground, that he was allowed to have a copy of the indictment three days before the trial. I thought it was no ground for a continuance beyond the term. I might, if it had been urged as a ground necessary for preparation, have allowed the case to stand until Saturday, when the three days would have fully expired. Friday was assigned for trial. On that day, as a ground for continuance, all the prisoners united on the ground, that they should have a copy of the indictment three days before the trial. I overruled the ground as a means of continuance beyond the term. Since the Court, I have examined the matter, and am satisfied, that the decision made without reference to authorities, was right.

"By 25 Ed. 3, P. L. 90, it was enacted, that in high treason or misprision of treason, the prisoners should have a copy of the indictment five days before the trial, *on paying the fees for the same.*

"The Act of 1731, sec. 43, P. L. 130, directs that persons accused of high treason, murder, felony, or other capital offence, shall have a true copy of the indictment three days before the trial, on requiring the same, and paying *the officer his usual fees.* This matter, as connected with the challenge of jurors; and the provision also to have a copy of the panel of the jury, three days before trial, is noticed in the *State vs. Quarrel*, 2 Bay, 152, and the *State vs. Fisher*, 2 N. & McC. 264. All, however, which is said relates to the question of challenge.

"It will be observed, that the Act gives the right to the accused to have the copy of the indictment three days before the trial, on requiring it. From whom? From the clerk is

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the obvious answer. For he is to pay "*the officer his usual fees!*" There was no application to the clerk, and no offer to pay his fees! Hence the prisoners could take nothing on this account. But I hold, it is no ground for a continuance if the clerk had refused the copy, on his fees being tendered. The Court would have compelled him to give a copy, and would have assigned a day, allowing three days from the time the copy was furnished. But there being no demand of the clerk, no fees tendered, the party could not ask for more than was allowed, a day, which suited them all, within the term.

"It appeared clearly that the prisoners convicted, and Bowman (who escaped a conviction more on account of his youth, being a boy of nineteen or twenty years of age, badly grown, than an absence of guilt) were associated in stealing the cattle, to obtain possession of which was the motive to murder the slave James.

"Their confessions alone were received, and when stated, will surely be amply sufficient to have convicted the two, who were convicted, and the other, who was not convicted.

"The proof was clear, that thirteen oxen belonging to Col. Morris, were stolen from his cattle-pen. One of them, a steer, with a red head, escaped, and returned. In the pen was the house of the cattle-minder, James, an exceedingly vigilant and faithful negro. He was missed on Friday, the 10th of October; his skeleton was found on Thursday 17th, about six hundred yards from the cattle-pen. The remains (the skeleton) were fully identified by the clothing, the color of the skin, a fragment of which remains, and other circumstances which it is now unnecessary to mention. It appeared, that his jaw bone had been severed at the chin, one of his lower ribs on the left side was broken, the left arm between the elbow and shoulder was also broken, the right foot, at the instep, was cut off! It appeared, that a negro, Sancho,

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belonging to Wm. Elliott, Esq., was concerned in stealing the cattle and killing the negro.

"The confession of Robert Miller made to McDonald, who had been sent to summon him to the inquest, and who warned him not to tell him anything about it—to make (if he chose to make a confession) his statement to the Magistrate acting as Coroner,—was to the following effect: he said that Winningham and Sancho had been twice to the pen to get the cattle—that the negro was too watchful—that they determined to kill the negro—that he and Bowman went with them—that Winningham and Sancho entered the pen—that he was *nigh enough to give assistance, if needed*—that Bowman was left in a clump of bushes one hundred and fifty or two hundred yards off—that he heard two blows struck—that Winningham and Sancho brought out the negro James—that he told Sancho to call Bowman—he was surprised to find he had joined them—he, Bowman, asked, what have you done with James, have you killed him? It was replied, we have fixed him so *he can't get up, or halloo* any more. The witness told him not to tell him about it, to stop: he, Miller, said, he would not have his neck cracked for one hundred dollars, (alluding to the price for which the stolen cattle was sold in Charleston.)

"Nat. Bowman told this same witness, 'I am going to tell all I know.' He said, that he, Winningham, Robert Miller and Sancho, went on the night of the murder, near to the cattle-pen; he stopped before he got to it; he saw Robert Miller, Winningham and Sancho, go towards the pen—he saw them no more until they returned, bearing the negro: they did not take the cattle that night; they concluded to take them the next, which they did. They turned them out, and guarded them the next day in Summers' old field—drove them Saturday night to Charleston, called up the butcher before day, and Winningham sold them.

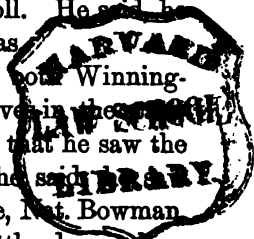
"Robert Bowman, a younger brother of the prisoner Nathaniel, proved that he saw Winningham guarding six-

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teen head of cattle in the old rice field (which I understood to be Summers' old field :) he told him they were stolen cattle. This witness proved, that his brother Nathaniel told him, that Robert Miller, Isaac Winningham and Sancho, killed the negro: he said Isaac knocked him down, Robert Miller cut his throat, and Sancho carried him out: he stood behind a clump of bushes. To Wm. McDonald, Winningham gave this account of his whereabouts; on Saturday night, after the murder, he said, he started to go through Caucaw swamp—met at an Island a white man, and a negro driving six head of cattle—the white man hired him to help drive: the witness asked him if they paid toll at Rantoles?—he said, the negro let them through without paying toll. He said he did not know who the white man or negro was.

"The acting Coroner proved, that he told both Winningham and Bowman not to criminate themselves in the statement made before him. Winningham stated that he saw the axe, (found, as I understood, in the pen): he said Sancho with it on Thursday. He said, that he, Nat. Bowman and Sancho, went Thursday night for the cattle, drove them out of the pen: did not see (James) the negro. On Thursday, Sancho said he had killed him. He saw Robert Miller on Thursday. He, Winningham, told Bowman on Thursday that Sancho had killed the negro. He said they took twelve head of cattle, drove them into the swamp: he said Bowman sold the cattle in Charleston for one hundred and eighteen dollars:—his, Winningham's share, was eighteen dollars—Robert Miller got thirteen dollars and eighty cents, Sancho got three dollars. He said Sancho told him he killed James with an axe. He said, all the (six) prisoners had knowledge of this murder, and received their shares of the money for which the stolen cattle were sold.

"There was much other testimony corroborating this proof, and going far to implicate James Miller, Murray and Williams.



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"The Solicitor had indicted them as accessories before the fact to the murder, in one count, as committed by Sancho the slave, and others: he offered under the authority of the *State vs. Sims*, 2 Bail. 35, the confessions of the slave to show his own guilt. It was received for that purpose alone, and the jury were told that it could have no effect beyond it.

"I submitted the case most carefully to the jury. I presume, James Miller, Murray and Williams owe their escape very much to my saying to the jury, that I thought they ought to be acquitted, the proof not being as to them sufficient to convict, although a very strong case of suspicion had been proved.

"It was in reference to them that the confessions of Bowman, Miller and Winningham were received on the ground, that they were accomplices. And in reference to them I said to the jury, if they all were confederated to steal the cattle, then the confessions or admissions of each would be evidence against the others. The proof was clear, that they were all associated to steal the cattle, in this case, and in another subsequently tried, in which they all were convicted of stealing the twelve oxen. But of this instruction the prisoners have no right to complain, for their own confessions with that of Bowman, their confederate, present at the murder, were alone received.

"The jury very properly convicted Robert Miller and Isaac Winningham."

They appealed and moved for a new trial, on the grounds

1. *Because*, the prisoners were entitled to a copy of the indictment, three days before the trial, and the same was refused.

2. *Because*, the declarations of some of the prisoners were received against the others, before proof of combination and conspiracy.

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3. *Because*, his Honor charged the jury, that if the defendants were connected in the stealing, or the killing, the confession of one is evidence against the whole.

4. *Because*, there was no evidence of confederacy to commit the homicide.

5. *Because*, the statements or confessions of the slave (Sancho) were incompetent.

6. *Because*, the verdict was contrary to the law and evidence.

Youmans, Williams, Perry, for appellants.

Hayne, Attorney General, contra.

The opinion of the Court was delivered by

WITHERS, J. We have given to this cause such degree of anxious consideration as properly belongs to one involving such momentous consequences, embracing not merely what concerns the prisoners, on the one hand, but something of what concerns the reasonably prompt application of public justice, on the other. We have been able to detect no mistake in the instructions given to the jury, or in any ruling upon questions of evidence upon any of the grounds, impeaching it, that have not been obviated by the report. It is quite unnecessary, therefore, to enter into the discussion of matters, derived from such grounds of appeal as the topics of argument here. It is also proper to say, that the resolution of the jury of the whole evidence, as to the guilt of the prisoners, does not present anything which would justify this Court in interposing, by the exercise of its high discretion in capital cases,

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between the verdict of the jury and its most grave consequences.

The subject which must be discussed and adjudged, arises upon the first ground taken, to wit, that in relation to the right of the prisoners to a copy of the indictment three days before the trial.

The 43d sec. of an Act of 1731, 3 Stat. 286, after reciting, (among other things,) that innocent persons, under criminal prosecutions, may suffer, from ignorance of the laws, as not knowing how to make a just defence, enacts, that "all persons that shall be accused and indicted for high treason, petit treason, murder, felony, or other capital offence whatsoever, shall have a true copy of the whole indictment, but not the names of the witnesses, delivered to them, or any of them, three days, at least, before he or they shall be tried for the same, whereby to enable them, or any of them, respectively, to advise with counsel thereupon, his or their attorney or attornies, agent or agents, or any of them, requiring the same, and paying the officer his reasonable fees for writing thereof, paying the usual fees for the copy of every such indictment."

The first question is, at what time, at the latest, must the prisoner, or his representative, "require" the said copy, upon pain of being held to a waiver of the right?

There seems to be no period, when this *must* be done, so suitable as that of arraignment. Of course application *may* be made at any time before, or a copy may be tendered the prisoner before. It is perfectly clear, that three days are peremptorily granted to the prisoner to use a copy of the indictment on the business of preparing for his "trial," and arranging the means of showing what is called his "just defence." There may be instances, where a prisoner is not arrested and may not know even that an indictment has been preferred and found against him, and notwithstanding he may be captured and instantly arraigned. In many cases, especially

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those in which a prisoner is unable to employ counsel, obscure and friendless, though he be incarcerated in the jail of the district where the indictment is found, he is yet as little able to have any sufficient knowledge of proceedings, as if he were beyond seas. Upon arraignment, the indictment is read to him: it may be bunglingly done, and he, in the confusion of terror and shame, dull of apprehension, wholly unlettered; but he is thus formally accused of what touches his life, and such occasion presents the earliest period at which we can be sure he can hear it and have any knowledge of its contents, for the first time. We do not think it safe, therefore, to fix a rule that shall compel a prisoner, charged capitally, to submit to a computation of the three days granted from a period anterior to that of arraignment.

The next question is, shall we consider what occurred at the arraignment of these prisoners, in conjunction with others, as equivalent to a requisition of the copy of the indictment? The presiding Judge did not so consider it. It is to be regretted, that the counsel who raise the question, had not been more explicit, or that a clearer understanding, of what they affirm was meant, had not been given to the Court.

Winningham and Miller do not occupy the same position in the particular now considered. Upon the arraignment none of the five prisoners, except the former, referred to the right in question, though the others were represented by chosen counsel, and he had to appeal for the like benefit, to the favor of the Court, guaranteed (as it is) by the same section of the aforesaid Act. Miller, with three of the others, moved and obtained a bench warrant for witnesses represented to be absent and material; that, undoubtedly looked to a trial, and this would have been impossible, during the time, if Miller meant to insist upon the privilege, now in contemplation, which the statute accorded to him, though a copy of the indictment might also have been demanded in perfect consistency with such a motion to secure witnesses if the time had

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been sufficient. It was Thursday, however, and the three days would have ended with the term. Winningham said he was not ready for trial, and insisted upon a *continuance*, upon the ground, that he was "allowed to have a copy of the indictment three days before the trial." A continuance beyond the current term was denied. This occurred in the presence of the other prisoners, and we have no means of knowing whether Miller and his counsel may have been then silent, as to a continuance or a copy, and failed to make a point in relation thereto, in consequence of what was addressed by the Court to Winningham's case. So it was, nothing was said as to that matter, on the part of Miller, until all were produced for trial, when Miller and the rest took the same ground that Winningham had taken upon arraignment. Touching Winningham's case a majority of the Court feel constrained to say, that what he did, being, as we have said, at the right time, or the suitable time, for that purpose, should have been regarded as "*requiring*" a copy of the indictment. The statute seems to be solicitous to secure this privilege, as one of consequence in the vindication of innocence, and though we are far from expressing the opinion that the present is such a case, yet it is not safe to be too exact in the interpretation of what is, for the most part, hastily done on circuit, to the exclusion of what the law considers a material right in such cases as this, and we cannot venture to place Winningham's right, under the law, upon what we might conclude as to his manifest guilt. The right is in no degree dependent upon the special qualities of any case. It is considered fit and proper, that the right in question should be exercised in open Court, and upon arraignment; whereupon an order (which sometimes may be necessary to effectuate the object) can be made obligatory upon the clerk, to be executed upon the condition that the prisoner, his agent or attorney, pay the fees, as provided by law. This would shut out all contest or ambiguity, as to whether the demand *was* made and *when* made; so that the computation

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of time can be attended by accuracy. It would be unsatisfactory, that one whose life is imperiled should fail to obtain a copy of the record, where it was demanded in good faith, by reason of inability to pay the fees. It is, perhaps, not likely to occur; but, however that may be, the law must have its course.

We have a case, overlooked in this discussion, and unpublished when the *State v. Quarral*, 2 Bay, 152, and the *Same v. Fisher*, 2 N. & McC. 264, were decided. It was adjudged in 1794, anterior to the earliest of those two, and is the case of the *State v. Gray Briggs*, 1 Brev. 8. The indictment was for horse stealing: the prisoner was arraigned on Thursday, (as in the case before us,) and demanded, under the same Act of 1781, a copy of the indictment, and three days to prepare for trial; was produced for trial on the Monday following, objected that the three days had not expired, because Sunday, which was non-juridical, was one of these, citing 4 Burr. 2130, and 1 Dallas, 327. *Sed per Curiam*, Waties, J.—“The rule with respect to time is, to include the day on which the motion is made. The computation of time must commence from the time when the motion was made. The whole day must be included, because there can be no fractions of a day.” However this resolution may conflict with judicial interpretation, of good repute, English and American, we must accept it as good authority for us, and the more readily since it may aid to withdraw what would otherwise prove a great impediment to the course of speedy public justice, in consideration of short terms, and great pressure of dockets. Two points are determined directly or inferentially: 1, that arraignment is the proper time, not too late at any rate, to demand a copy of the indictment: 2, that the day of the motion shall be reckoned as one day of the three allowed. With alacrity in the finding of the bill and prompt arraignment, the last position may serve to diminish the hazard of that delay of public justice towards

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the innocent, or towards great offenders, as the case may be, which may ensue in many cases, as the matter is, from demanding a copy of the indictment at a term restricted to six days for all kinds of business, and the first day devoted to the summary process docket. But the right is clear; it may prove of vast consequence in some cases, we are not to say in which, however we may suspect, that in the present instance it is of little consequence upon the merits. If the evil be such as we fear it may prove to be, a remedy can be applied by the legislature by reducing the term of three days. As the matter of right is beyond our discretion or control, it must be conceded to Winningham, *ex debito justitiæ*.

The diversity in Miller's case has been pointed out. Claiming, as already said, a matter of strict, naked, legal right, which when due we cannot withhold, and when not due we ought not to concede to a case in which we are confident clear justice has been administered, a majority of us have been driven to the conclusion, that in strictness, Miller waived his right to claim the benefit (if any there be) to be derived from the Act of 1731. We have encouragement to say so from what is said in the two cases above cited, from 2 Bay, & 2 N. & McC., as well as in the observations of Judge Story, in the case of the *United States v. Curtis*, 4 Mason, at p. 244, as follows; "a party may have a legal right to an exception, which he cannot take in every stage of a cause. The law points out an order in its proceedings, and requires that a party should take his exceptions, and demand his privileges, at such time as general justice and convenience require; otherwise he is deemed to waive them. A party is certainly at liberty to waive any privileges introduced solely for his benefit; and if he is satisfied in going on without them, and sustains no prejudice thereby, there seems no ground to arrest the judgment, or grant a new trial, on this account." In that same case, after the jury had possession of it, and the complaint was, that the prisoner had not been furnished with

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a copy of the indictment, it was proposed by the Court to withdraw the cause, that the privilege should be allowed, not that it was matter of right in the prisoner, but of discretion in the Court.

Notwithstanding what we have laid down for law as to Miller's case, to a majority of the Court, (and I am not of that majority on this point,) it appears proper to exercise in behalf of Miller, the high discretion with which the appellate tribunal is vested, in capital cases, and which has been heretofore exercised (vide the *State v. Kirby*, 1 Strob. 155) to grant a new trial, whenever any misapprehension may have affected the line of a prisoner's defence, or ample time or opportunity may not have been had by one whose life has been declared forfeited, to meet a material question suddenly started, and working some surprise, and the like. *Kirby's* case was one affected by this last consideration. It *may* be, as some of the Court think, that Miller did not press a motion that he might have made, after hearing what befel Winningham's. Under such circumstances, in view of the fact that there is serious division in the Court, and that it is not desirable to separate the fate of the two, who have been partners in the shocking crime imputed to them, and have been tried together, upon such point as has been herein discussed, it is thought best to send both persons before another jury, who, after the prisoners shall have had every legal right which they can claim from the law, and every advantage that can be conceded by a liberal discretion, will, in the end, do that solemn duty which the highest sanctions impose, as well towards the guilty as the innocent.

The motion for a new trial is granted to Winningham as a matter of strict, technical, right, and, upon the considerations set forth, to Miller, *ex gratia*.

WARDLAW, WHITNER, and MUNRO, JJ., concurred.

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O'NEALL, J. In these cases I adhere to the views stated in the report, and the prisoners ought not to have a new trial.

If there was the slightest ground to believe, that either, or both prisoners were believed by any one to be innocent, I would willingly, nay gladly, consent to a new trial, although I believed there was no legal ground for it. But when they stand before me plainly guilty of the most atrocious murder, ever committed in the State, I should feel that I was derelict in my duty if I did not hold them to a strict observance of law.

Neither of them legally demanded a copy of the indictment, and how a proposition to continue can be construed into such a demand, I confess I cannot perceive.

Motion granted.

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E. H. MARTIN *vs.* S. P. MANER.

B. was indebted to S. his factor by book account, and S. was indebted in the same way, but in a smaller sum, to A. A., through B. her agent, directed S. to transfer the amount due her to B.'s credit, to which S. assented, but neglected to make the transfer on his books:—*Held*, that a transfer on the books was not necessary to the completeness of the transaction—that, by the agreement and assent of the parties, the indebtedness of S. to A. was *ipso facto* extinguished, and, *pro tanto*, the indebtedness of B. to S.

BEFORE WHITNER, J., AT BEAUFORT, SPRING TERM,
1856.

The report of his Honor, the presiding Judge, is as follows :

“This was a suggestion filed by the plaintiff, an attaching creditor of Samuel Solomons, against the defendant, as garnishee. There was a small balance ascertained by the parties themselves to be still due the attaching creditor, and which would have been included in the payment made into Court, but for an error in calculation. This was reported to me as agreed on between the parties, as seventy-one dollars and thirteen cents, but which, from the data furnished, I make twenty-one dollars and fifteen cents.

“The matter really in controversy, however, and that gave rise to the present issue, is whether the defendant, S. P. Maner, shall be charged with the further sum of one thousand one hundred and seventy-eight dollars and eighty-seven cents. In discharge of his admitted indebtedness to Solomons, he had paid into Court the sum of six hundred and sixteen dollars and forty-six cents, and was entitled to retain as creditor in possession as conceded, five hundred and sixty-eight dollars and sixty-eight cents, making in the whole

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(the sums paid over and retained), one thousand one hundred and eighty-five dollars and fourteen cents.

"The following facts appeared on the trial. Samuel Solomons was a factor in the city of Savannah, Georgia, and did the business of the defendant and his mother, Mrs. Catharine Maner, the business of the latter being conducted entirely through the agency of different sons of Mrs. Maner, one of whom was this defendant. Samuel Solomons failed in business 27th March, 1854.

"The plaintiff lodged his writ in foreign attachment, March 29th, 1854, in the sheriff's office for Beaufort district, a copy of which was served on this defendant as garnishee, 30th March, 1854. On the books of Mr. Solomons, 30th March, 1854, there was standing to the credit of Mrs. Catharine Maner, the sum of one thousand one hundred and seventy-eight dollars and eighty-seven cents, and to the debit of this defendant, S. P. Maner, two thousand three hundred and eighty-five dollars and sixteen cents.

"Sometime in January preceding, there seems to have been an understanding between the parties that a change should be made in these accounts. Accordingly, on or about the 7th January, 1854, S. P. Maner instructed Mr. Solomons to transfer to his credit the amount which was due to his mother, Mrs. Catharine Maner. This transfer was in fact made March 31st, 1854, as of date, however, 10th March, 1854. Mr. Solomons was examined in reference to this transaction, admitted these instructions, stated that such were the relations between these parties that he felt no hesitation in regarding this defendant as fully authorized to give them, and designed so to transfer the accounts. That there was no special reason for his neglect or delay, supposing as he did that it might be done at any time. Mr. Solomons knew of no consideration moving to this arrangement between S. P. Maner and Mrs. Catharine Maner.

"Mr. J. G. Lawton had been authorized to procure a simi-

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lar transfer as to the account of Miss Maner, about the same time, and had given his note to Miss Maner for amount to be passed to his credit. That hearing of the failure of Solomons, he went immediately (31 March) to see if the transfer was made. Finding that it had, he inquired also if the other transfer was made as between S. P. Maner and Mrs. Maner, and was informed it had been forgotten. It was then made, however, as above stated. This witness knew nothing of anything passing between Mrs. M. and her son, but had taken it for granted their matter was to be arranged as his had been. He proved fully the fact that Mrs. Maner's business had been always transacted through the agency of her sons, especially this defendant, S. P. Maner. Mr. Solomons said the omission was accidental, and if S. P. Maner had been an irresponsible man, he had no doubt he (Solomons) would have been more prompt in making the transfer.

"As there seemed to be no controversy about the fact, and no question as to the bona fides of the transaction to be settled by the jury, I suggested the propriety of counsel preparing a special verdict, which being agreed to, the case was passed to give time. On the next day, however, at the moment of adjourning the Court for the term, it was found that the counsel could not agree upon some point, and the case was committed to the jury without argument, who, on my instructions, perhaps without leaving their box, returned a verdict for the actor in the suggestion for the sum of one thousand three hundred and seventy-nine dollars and forty-two cents, being for the admitted balance due by S. P. Maner, of seventy-one dollars and thirteen cents, or twenty-one dollars and fifteen cents, as the case may be, and the amount of this credit carried into the books subsequent to the attachment, one thousand one hundred and seventy-eight dollars and eighty-seven cents, and interest, being a factor's account for advances from 30 March, 1854, one hundred and sixty-nine dollars and forty cents."

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The defendant appealed, and now moved this Court for a new trial, on the grounds:

1. Because the instructions given by the authorized agent of Mrs Catharine Maner, to Solomons, the factor, on the seventh day of January, 1854, to transfer the balance on his book in favor of Mrs. Maner to the account of S. P. Maner, was binding on the factor, and the entry in the books, though made afterwards, ought to be taken as having been made on that day, and his Honor erred in charging, and the jury in finding otherwise.

2. Because the neglect of the factor to obey the instruction of Mrs. Maner, through her authorized agent, was a fraud upon Mrs. Maner by the factor, from which neither he, nor his creditors, can derive any legal benefit, and his Honor erred in charging, and the jury in finding otherwise.

3. Because the instructions of the agent to the factor, and not the entry in the books, constituted the disposition of the fund, and his Honor erred in charging, and the jury in finding otherwise.

4. Because the service of a copy of attachment upon the defendant created no lien upon his debt to the defendant in attachment.

5. Because the charge of his Honor, and the verdict of the jury was in other respects contrary to law and the evidence.

Fickling, for the motion. The creditors of Solomons can have no rights which he did not have. They cannot avail themselves of his neglect, to make the transfer any more than he could; and surely if he were plaintiff he could not recover.

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Tillinghast, contra. This was only an agreement to transfer which had not been consummated when the attachment was served. The service, therefore, created a lien upon the debt. *McBride vs. Floyd*, 2 Bail. 209.

The opinion of the Court was delivered by

MUNRO, J. In *Tatlock vs. Harris*, 3 T. R. 180, Buller, J., puts this case: "Suppose A. owes B. one hundred pounds and B. owes C. one hundred pounds, and it is agreed between them, that A. shall pay C. the one hundred pounds. B.'s debt is extinguished, and C. may recover that sum against A." And in *Izard vs. Douglas*, 1 H. Black. 239, A. being indebted to B., and B. indebted to C. gives an order to A. to pay to C. the sum due to him from A.; the order was accepted by A. and on his refusal to comply with the order, C. may maintain an action for money had and received against him. Gould, J., said: "The case is like that of a man having money due me in his hands, which I order him to pay to another. Now if I pay money to you for another person, it is money had and received by you to his use. But where is the real and substantial difference, whether I in fact pay money to you for a third person, or whether I give you an order to pay so much money to which you expressly assent. In reason and sound law, it is money had and received to the use of such third person. If my debtor tenders me money, which I give back to him, and tell him to pay it to another, he then in point of fact receives money to the use of the other. But is there any difference between such a case, and the present." See also Chitty on Contracts, 582, where the whole doctrine is discussed, and the authorities cited.

Nay, so far have Courts of law gone in maintaining equitable assignments, that they have held, when an order is drawn on a particular fund, that, after notice to the drawee,

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it binds the fund in his hands. *Robbins vs. Bunscome*, 3 Greenleaf, 546; 5 Wheaton, 277.

Let us apply the principle to the case in hand. As the defendant's agency has not been controverted; suppose, that instead of directing the amount which was due to his principal by Solomons, to be transferred to his own credit, he had drawn the fund out of Solomons' hands, and paid it back to him in part payment of his own debt? As the authorized agent of his mother, it was entirely competent for him to have done so; and where it may be asked is the difference between his receiving the money himself, and paying it back to his creditor, and directing its appropriation by the debtor of his principal, either to the payment of his own debt, or to any other purpose.

All that was necessary to constitute a legal transfer of the debt, was the direction for its appropriation by the creditor, and the assent of the debtor; the moment the latter assented to it, the transfer was complete; and neither the omission, or neglect of the debtor, to enter the transfer in his books, could operate to defeat an arrangement, that had been dictated by the creditor, and assented to by himself.

It is beyond all controversy then, that by the operation of the agreement between Solomons, and the defendant, acting as the lawfully constituted agent of his mother, the interest of the latter in the fund in question was extinguished, and became completely vested in the defendant; and it was quite immaterial, so far as concerned the validity of the transfer, whether a formal entering of the transaction had ever been made in the books of Solomons or not.

The plaintiff is therefore directed to enter a *remittitur* on the record for so much as the verdict exceeds seventy-one dollars and thirteen cents, the amount admitted to be due by the defendant; and on this being done, the motion is dismissed; but if he should neglect, or refuse to enter such

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remittitur on or before the first day of March next, then the motion is granted.

O'NEALL, WARDLAW, WITHERS, and WHITNER, JJ., concurred.

Motion granted.

Railroad Company vs. Rodrigues.

THE N. E. RAILROAD COMPANY vs. B. B. RODRIGUES.

A subscription to a Railroad Company, *held* valid, though made to one who was not a commissioner to receive subscriptions, but who, taking an interest in the Road, went about soliciting subscriptions in order to secure the charter.

Where the charter of a Railroad Company declares, that the share of a defaulting stockholder, "shall be liable to forfeiture, and the Company may declare the same forfeited and vested in the Company," the option to forfeit is with the Company, and not with the stockholders.

A stockholder is bound by his subscription to a Railroad Company, though he subscribed under the mistaken belief that he might forfeit his stock at his pleasure; and it makes no difference that he was assured by the person taking the subscription that he had the right under the terms of the charter to forfeit, such assurance being founded on mistake and not being wilfully false.

BEFORE O'NEALL, J., AT CHARLESTON, SPRING TERM,
1856.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of assumpsit, brought to recover the instalments on ten shares in the capital stock of the N. E. Railroad Company, alleged to have been subscribed by the defendant.

"It appeared, that the shares were fifty dollars each, and were called for at 60 days; one dollar on each share was paid at subscription.

"The proof was, that there was great difficulty in making up stock enough to secure the charter. Ward committees were appointed to solicit subscriptions. The heading of the subscription, in each Committee's hands, was drawn by the Mayor, General Schnierlie. It simply was an agreement (not under seal) to take as many shares in the N. E.

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Railroad Company as were set down opposite to each name. Col. Blum, for the Company proved, that he was one of the Ward committee (No. 4,) who waited on the defendant. He assured the defendant he might forfeit his subscription after he had subscribed and paid one dollar on each share. This was as he understood the direction of the Mayor. In consequence of this understanding, the defendant subscribed and paid one dollar per share. The Commissioners appointed under the charter, gave the receipts for the payment on the subscriptions.

"These facts were also proved by Horlbeck and Bancroft, the other members of the Committee from Ward No. 4.

"Mr. Middleton the Secretary of the Company, proved the calls for the payment of the instalments, according to the terms of the charter. That the defendant, as a subscriber for ten shares, having paid one dollar per share at subscribing, was entered upon the subscription books by the Commissioners under the charter: the books were regularly opened and closed.

"Mr. Solomons, in the defence, proved, that the defendant was persuaded to subscribe by being told he could forfeit. He said he would give ten dollars—he did not want the stock.

In reply.—*Genl. Schnierlie*, Ex-Mayor, proved, that he was the Mayor, and wrote the heading of the subscription for the Ward committees. He referred to the clause of the charter providing for a forfeiture. His opinion was, that the Company would allow a forfeiture, and that opinion he gave to the Committee-men of the Wards.

"The case was submitted to the jury on the question, whether the defendant was induced by misrepresentation to subscribe? If so, they should find for him—otherwise, for the Company.

"They found for the plaintiffs. The defendant appeals: The grounds I have not in my possession: they were an-

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nexed to the report made out and delivered to the defendant's attorney many months ago. He tells me he has lost the report—and at his instance, from my notes, I have made up this report. The original subscription, the charter, and books of the N. E. Railroad Company, ought to be produced."

The defendant appealed and now renewed his motion for a non-suit; and failing in that, then for a new trial on the grounds:

1. Because, the plaintiff failed to prove a subscription by the defendant in conformity with the terms of the charter of the North Eastern Railroad Company.

2. Because, the testimony produced by plaintiff, clearly showed that the subscription made by defendant was made upon the distinct understanding and condition, that he should have the privilege of forfeiting his shares.

3. Because, there being no testimony that the parties who procured defendant's signature, were acting under the authority of the Commissioners of the N. E. Railroad Company, the said Company in subsequently recognising, and availing themselves of the benefit of the acts of these parties were bound by the representation, upon the faith of which it was clearly proved, the subscription had been made.

4. Because, by the plaintiff's own showing, the inducement held out, and by which alone the subscription could have been procured, was an express understanding that the forfeiture would be allowed by the said Company, and the party discharged from further liability; and to suffer the said Company to violate that understanding is to enable them to profit by a fraud committed on the defendant.

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5. Because, by the terms of the charter of the N. E. Railroad Company, the defendant was at liberty to forfeit his shares.

6. Because, as the subscription was secured under a mistaken view of the law, caused by the erroneous representations of those who procured it, the said Company should have been required in accepting such subscription to act in conformity with those representations.

Seymour, Memminger, for appellant.

Martin, contra.

The opinion of the Court was delivered by

WHITNER, J. The defendant subscribed to the capital stock of the N. E. Railroad Company in a book which had been prepared, by the mayor, for the time, and subsequently copied in the book of the commissioners appointed by the legislature. The defendant also paid at the time, the sum of money required by the terms of the charter to render the subscription valid.

The book contained a suitable caption under which the signature was placed, aided if necessary by an exhibition of the charter, a copy of which was attached to the first page of the book. It cannot avail the defendant that the subscription may not have been made in the presence of the commissioners, or that it was made at the instance of another taking an especial interest in the enterprize. The fact of such a subscription created an obligation and promise to pay the further sums when required according to the terms of the charter, unless there is found something else in the case to relieve the defendant. *G. & C. R. R. Co., vs. Cathcart*, 4 Rich. 89.

The eighth section of the charter (Act of Assembly, 1851, p.

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132) in reference to unpaid instalments, prescribes that "in case any instalment on any share shall remain unpaid for the space of ninety days after the time appointed for payment thereof, such share *shall be liable to forfeiture* and the company may declare the sums forfeited and vested in the company, but such forfeiture shall be deemed to discharge the defaulting stockholder from the obligation to pay the amount remaining unpaid on the forfeited share." In the case above cited, and other cases are to be found in our books, it has been held that the right to forfeit is not at the option of the subscriber, but of the company, being a power merely cumulative, to secure and not to defeat the enterprise. The terms of the charter under review in the case cited will be found more favorable to the subscriber desiring to forfeit, than in this charter. In the former charter in case of default, the *share*, and the money paid on account thereof, it is declared, *shall be forfeited* to the company; the latter, prescribes that such *share* shall be *liable to forfeiture* and the company *may* declare the same forfeited.

But it is said in the present case the right to forfeit was one of the terms of the contract promised on the one part, and reserved on the other, at the time of subscription. The circumstances present a case very analogous to the case *G. & C. R. R. Company vs. D. M. Smith*, 6 Rich. 91. We are warranted in the conclusion as well by the verdict of the jury as the facts in evidence that the defendant was not induced by misrepresentation to subscribe. The *facts* were spread before the defendant *truly*. All the means of a correct judgment were afforded. The principles settled and the course of reasoning adopted in *Smith's* case to hold him to his contract are even more clear and forcible when applied to the case in hand. If it be conceded that the person who presented the book for subscription was the agent of the commissioners appointed by the legislature, it will be seen at once that the commissioners were appointed for a specific object and with limited powers the very precise terms of which were furnished to the defend-

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ant. They had no power to stipulate beyond the charter. That the mayor, or the committee-man, or the commissioner to receive subscriptions, should entertain and very honestly express the opinion, even although in such expression it assume the confident tone of an assurance, that a subscriber would have the right under the charter to forfeit his share on his own motion, cannot vary the law of the case. Judges and eminent lawyers before them have made the same mistake in reference to other charters of like import.

In this case there was no fraud practiced by the company or by their authorized agent. The company had not then an existence. If the defendant at the time of subscribing had accompanied his subscription with this or any other condition inconsistent with the contract, sending it forward in the form of a written stipulation, then a question may have been presented, whether it was not a void contract upon its face, or the further question raised, whether the company by its acceptance did not bind themselves to ratify the election of the defendant. We have no such case to deal with. To allow such a privilege, or avoid an obligation incurred as this has been, might well be obnoxious to the public and certainly to the other stockholders who have embarked in a common enterprise according to the provisions of the charter. But without any imputation on any of the parties, each acting in good faith, it must be held one of those mistakes in ignorance of the law against which there is no relief, even although the defendant confided in a judgment deemed better than his own.

The motions for non-suit and new trial are dismissed.

O'NEALL, WARDLAW, WITHERS, and MUNRO, JJ., concurred.

Motions dismissed.

McNair vs. Railroad Company.

R. T. McNAIR vs. SOUTH CAROLINA RAILROAD COMPANY.

New trial ordered upon a question of fact—the verdict having nothing to sustain it, and being therefore capricious.

BEFORE O'NEALL, J., AT CHARLESTON, SPRING TERM,
1856.

The report of his Honor, the presiding Judge, is as follows:

“This was an action to recover for two boxes of tobacco, alleged to have been received by the Company for transportation and not delivered at the place to which they were consigned.

“The receipts of the Company signed by two of its agents were given in evidence, dated the first, 6th December, 1853, for fourteen boxes; the second, 7th December, 1853, for seven boxes, making together twenty-one. The freight list showed that nineteen were delivered: this list given in evidence by the plaintiff, had a memorandum upon it, that the nineteen boxes weighed two thousand two hundred and forty pounds, which was the weight of the twenty-one boxes.

“The Company alleged that in truth and in fact it had received only nineteen boxes and that the receipts were given for a larger number by mistake, and I thought the mistake was clearly shown.

“J. A. Heidtman, the agent of the Wilmington Boat proved that he delivered to the plaintiff on the 6th December, 1853, nineteen boxes of tobacco.

“J. A. Miles, the receiving clerk of the railroad, but who signed neither of the receipts, said he was present at the delivery by the plaintiff of the tobacco in two parcels, and that nineteen boxes were delivered. The proof of these two

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witnesses with the memorandum on the freight list given in evidence by the plaintiff, made the mistake plain and palpable to my mind.

"The jury, however, found something in the case to justify them in coming to a different conclusion. They found for the plaintiff one hundred and five dollars."

The defendants appealed, and now moved for a new trial, on the ground:

That the fact of a mistake in the quantity specified in the receipt was clearly proved, and that the verdict of the jury was directly contrary to the charge of his Honor and to the law.

Conner, for appellants.

Yeadon & McBeth, contra.

CURIA, PER O'NEALL, J. In this case the mistake in the receipts was, we think, most clearly shown.

To show this it is only necessary to state the defendant's proof, as set out in the report.

The plaintiff, on the 6th of December, received by the Wilmington Boat, nineteen boxes of tobacco. On the same day, as appears by the first receipt of the defendant's, fourteen boxes were received, and on the next day, by the second receipt, seven boxes more were received, making thus twenty-one boxes, two more than the plaintiff (who is stated by his counsel to be a Virginian, trading in tobacco,) received from the Wilmington Boat. The receiving clerk of the defendant proved, that he was present when the plaintiff's tobacco was received by the defendant, and that only nineteen boxes were received. The freight list given in evidence by the

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plaintiff, showed by a memorandum upon it, that the nineteen boxes delivered at the destination, weighed two thousand two hundred and forty pounds, the precise weight of the supposed twenty-one boxes.

How after this, there can be any room to doubt the mistake, I cannot conceive.

It is true that the verdict of the jury, when there may be conflicting proof, is *generally* conclusive. But when the facts are all on one side, and the jury resort to conjecture, or prejudice, to find against them, it is the duty of this Court to order a new trial.

Formerly the rule was uniform, that, where the presiding Judge reported, that the verdict was clearly against the evidence, a new trial followed, as of course. That such would be a wise course now, I have no doubt. For the circuit Judge knows better than we can know, whether the verdict has any such support in fact as to justify its being sustained against the apparent weight of the evidence.

But without resorting to the opinion of the Judge below in this case, (as expressed in his report) we think the verdict has nothing to sustain it, and is therefore capricious.

The motion for a new trial is therefore granted.

WHITNER and MUNRO, JJ., concurred.

Motion granted.

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JAMES C. AYER vs. BENJAMIN MORDECAI.

A. sent to C., a druggist, certain boxes of medicine, to be sold on commission. C. failed and assigned his stock of drugs, including A.'s medicines to H. a creditor and H. sold them to M. In trover by A. against M. *Held*, that although H., who paid no money, but whose assignment was in consideration of the indebtedness to him, could not have been protected had he been sued, yet that, if A., by his conduct, enabled C. to hold himself out as the true owner to the deceit of those who dealt with him, and if M., who paid money, was really deceived by the appearances, A. could not recover against him.

New trial ordered that the case might be submitted to the jury with proper instructions.

BEFORE MACBETH, R., IN THE CITY COURT, OCTOBER
TERM, 1856,

The report of his Honor, the Recorder, is as follows:

"This was an action of trover, brought to try the title to several boxes containing 'Ayer's Cherry Pectoral,' which were in the possession of the defendant. From the evidence, which was principally by commission, it appeared that the plaintiff, who resided in Massachusetts, had, sometime in September, 1854, sent to the firm of P. M. Cohen & Co., Druggists, of Charleston, five gross of Cherry Pectoral, to be sold by them, for his account, on commission. About the 10th of March, 1855, P. M. Cohen & Co. failed in their business, and were utterly insolvent. At the time of their failure they were largely indebted to the firm of Hopkins, Hudson & Co. John J. Cohen, a brother of P. M. Cohen, was a member of the last named firm. With the view of settling their debt to Hopkins, Hudson & Co., P. M. Cohen & Co. transferred to them their store and their whole stock of drugs, etc., and, amongst

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other things, the boxes of 'Ayer's Cherry Pectoral,' which are the subject of this suit.

"About two months after, Hopkins, Hudson & Co. sold and transferred the said store and stock to the defendant, Mordecai, and with the store and stock the said boxes of Cherry Pectoral.

"On the 9th of May, 1855, P. M. Cohen and one Philip Wineman advertised that they would conduct the business heretofore carried on by P. M. Cohen & Co., as the agents of B. Mordecai, (the defendant) at the store No. 29 Hayne street.

"The value of the goods and the conversion were proved, and the plaintiff closed. The defendant offered no evidence in reply.

"I instructed the jury that P. M. Cohen & Co. had no right, after their known insolvency, to transfer the plaintiff's boxes of Cherry Pectoral, in payment of their debts, to Hopkins, Hudson & Co. 1 Bay. 295. And, that as Hopkins, Hudson & Co. took nothing by the transfer, they could confer no title on the defendant, in their sale to him, of the said boxes.

"The jury found for the plaintiff."

The defendant appealed and now moved this Court for a new trial on the grounds:

1. Because his Honor erred in charging the jury, that the plaintiff had a right to recover his goods from the defendant, although a third party, and a *bona fide* purchaser for valuable consideration, without notice, if the same were consigned on commission; that the said goods so consigned on commission, may be recovered, although they may have legitimately passed, by sale, through any number of hands.

2. Because there was no evidence to prove that P. M. Cohen & Co. were factors.

3. Because there was no evidence of the fact that Hopkins,

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Hudson and Co., or the defendant, B. Mordecai, had any notice that said merchandize, in question, was consigned to P. M. Cohen & Co., to be sold on Commission.

Davega, Tobias, for appellant.

1st ground. Was the sale, by P. M. Cohen & Co., to Hopkins, Hudson & Co. valid, if so the defendant, B. Mordecai, had a good title?

It is not disputed that the sale by P. M. Cohen & Co., to Hopkins, Hudson & Co., was *bona fide*; but the question is made, whether the sale by P. M. Cohen & Co. to Hopkins, Hudson & Co., and Cohen & Co's. acceptance of their debt to H. H. & Co., in settlement, was obligatory upon the plaintiff.

Conceding that a factor has no right to pledge goods of his principal as security for his own debt; this was a sale, and not a pledge, and there is a material distinction between a pledge and sale. By a pledge is understood a thing that not only *may be redeemed*, but generally one that is intended to be redeemed. *Bowie & Sons vs. Napier*, 1 McCord, 1; 2 Kent Com. 626.

The position of defendant, B. Mordecai, is that of a *bona fide* purchaser, for valuable consideration; and the law favors him, even though he had purchased from a fraudulent vendee. Though a fraudulent vendee may be sued in trover by the vendor, yet the right of action does not exist against every person into whose hands the property may have passed subsequently. *Sheppard vs. Shoolbred*, 41 Eng. Com. L. R. 39; *Buffington vs. Gerish*, 15 Mass. R. 156

In *Mowry vs. Walsh*, the principle is maintained, that if one obtains goods by a fraudulent purchase, void as to himself, yet if he afterwards sell them to a *bona fide* purchaser, without notice of the fraud, the property passes to the latter. 8 Cowen, R. 238.

2nd ground. There was no evidence to prove that P. M.

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Cohen & Co. were factors; on the contrary, they were druggists, and held themselves out to the world as owners. The question is not whether a party can transfer that to another which he does not in reality own; but whether, where a party is ostensibly clothed with the ownership of property by the real owner, and thus has an apparent power to sell, should not a sale by him, to a *bona fide* purchaser, be good. *Root vs. French*, 13 Wend. 571.

It is a clear rule, at Common Law, that if a principal permits his factor to assume the apparent ownership of goods, and to sell them in his, the factor's own name, the vendee who bought them, in ignorance that the factor acted merely as agent, may, to an action by the principal for the price, set off a debt due to him from the agent. 1 Chit. Pl. 570.

Mowry, contra, cited Story on Ag. § 113; 2 Kent, Com. 626; 1 Hill, 16; 11 Howard, U. S. R. 209.

The opinion of the Court was delivered by

WARDLAW, J. This case, like that of *Carmichael vs. Buck*, in which we have just delivered the opinion, was decided by rules of law supposed to settle it, without submission to the jury of facts which might have modified those rules. To the opinion we have mentioned, we refer for much that is applicable to this case.

If Hopkins, Hudson & Co., had in the ordinary course of trade, bought the plaintiff's goods from P. M. Cohen & Co., and this suit had been against them, then the inquiry should have been, first, were P. M. Cohen & Co., authorized to sell? If not, second, which of two innocent persons shall suffer? That second would have been equivalent to the question, which gave credit to P. M. Cohen & Co., by reposing trust in them? and that question would have been resolved by evidence as to the nature of the appearances which the plaintiff

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permitted them to assume: Did he hold them out as his agents authorized to sell, or did he permit them to appear as true owners of his goods?

But Hopkins, Hudson & Co., did not buy from P. M. Cohen & Co., in the ordinary course of trade:—they took boxes of goods from them after they had become insolvent in payment of a pre-existing debt. Hopkins, Hudson & Co., if they knew that P. M. Cohen & Co., were agents to sell the goods on commission, could not have supposed that the authority to sell included an authority to assign after insolvency. If they supposed that P. M. Cohen & Co., were real owners, still Hopkins, Hudson & Co., would not have stood in a situation entitled to regard equal to that bestowed upon the true owner: If they should have lost the benefit of their assignment of the goods in question, they would not have been sufferers in equal degree as the plaintiff would be if he should lose his property:—for they paid no money for these goods, and upon return of the boxes to the plaintiff would have been in the same condition they were in before they took them in part satisfaction of their debt. Against Hopkins, Hudson & Co., the plaintiff would then have prevailed. 11 How. U. S. R., 209, *Warner vs. Martin*.

Is the defendant, Mordecai, in any better situation? If Hopkins, Hudson & Co., acquired no title, they could have transferred none: but their transfer, accompanied by the payment of a price to them, might have put Mordecai in the situation of an innocent purchaser, entitled to ask, that, as between himself and the plaintiff, the loss should fall upon him whose misplaced confidence occasioned it. If Mordecai, or his agent, knew that the goods really belonged to the plaintiff, and had been assigned to Hopkins, Hudson & Co., in payment of the debt of P. M. Cohen & Co., then Mordecai is affected with notice, which puts him in the same situation that Hopkins, Hudson & Co., were in. But if Mordecai and his agents did suppose, and from all appearances and circumstances should

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have supposed, that P. M. Cohen & Co., were the true owners of these goods, and that the assignment of them was in all respects fair, then Mordecai will stand in the same situation as if he had innocently bought the boxes from P. M. Cohen & Co., and the questions will be whether the plaintiff by his conduct enabled P. M. Cohen & Co., to hold themselves out as the true owners to the deceit of those who dealt with them: and whether Mordecai was really deceived thereby.

We desire to be understood to have formed no opinion on any of the questions that we think the defendant might have required to be submitted to the jury, and we order a new trial only that an opportunity for a proper trial of these questions may be had.

Motion granted.

WHITNER and MUNRO, JJ., concurred.

O'NEALL, J., I dissent.

Motion granted.

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JAMES W. PRITCHETT AND DAVID D. ALLEN vs. THOMAS
R. SESSIONS.

Where, in trover against the Sheriff for levying, under foreign attachments, a steam boat claimed by the plaintiffs as assignees of the absent debtor, the question was, whether the attaching creditors had notice of the assignment, *held*, that notice to their agent was notice to them, and that the agent's declarations at the time of levying the attachments were admissible as evidence to show notice.

BEFORE MUNRO, J., AT GEORGETOWN, SPRING TERM, 1856.

The report of his Honor, the presiding Judge, is as follows :

" The circumstances out of which the present controversy has arisen, are these :

" One James E. Metts, a citizen of the State of North Carolina, being extensively engaged in the turpentine business in this State, and possessed of a large amount of property in the districts of Georgetown and Horry, consisting of lands, slaves, steamboats, turpentine, and stock necessary to carry on said business, by a deed bearing date the 31st of July, 1855, conveyed his entire estate, real and personal, to the plaintiffs in this action, in trust, for the payment of his debts, in the order set forth in the deed of assignment.

" The deed of assignment was executed in Wilmington, North Carolina, and was recorded in the proper office in that place, on the 2d day of August in the same year, and was also recorded in Georgetown, in this State, on the 14th day of August.

" That among the creditors to whom Metts was indebted at the date of his assignment, were Benjamin Blossom & Son, merchants, in the city of New York, and Joseph R. Blossom, a resident of Wilmington, North Carolina.

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" That on the 6th day of August, and while Metts was absent from this State, Joseph R. Blossom visited Georgetown and caused two writs in foreign attachment to be issued, one of which was in his own name, as plaintiff, and the other in the names of Benjamin Blossom & Son, against the said Metts as an absent debtor; that the writs were lodged in the office of the defendant, who was then, and is still, the Sheriff of Georgetown—who, by virtue thereof, on the 6th and 7th of August, attached as the property of the said absent debtor, several tracts of land, a steamboat called the Union or Eliza, and a lighter attached thereto, eleven slaves, a quantity of turpentine, &c., all of which is included in Metts' deed of assignment; that the said writs of attachment having been forwarded to the Sheriff of Horry, he, by virtue thereof, on the 9th of August, attached another steamboat, called the Fairy, as the property of Metts, and which is also included in the deed of assignment.

" Upon the defendant's refusal to deliver up to the plaintiffs the property which he had thus attached, pursuant to a demand made for that purpose, the present action which is in trover was commenced; that sometime subsequent to the commencement of this action, the defendant did surrender to the plaintiffs a portion of the property which he claimed to hold under the attachments, to wit, eleven slaves, upon the plaintiffs executing to him a bond in the sum of twelve thousand dollars, conditioned for the re-delivery of said slaves in the event it shall judicially appear that the attaching creditors of Metts are entitled thereto; and that some time afterwards, upon the execution by the plaintiffs of a similar bond, in the same amount, the defendant surrendered to them the two steamboats and the lighter.

" The grounds relied on in the defence, were—

" 1st. That Metts' assignment was absolutely void, having been made in fraud of his creditors.

" 2d. That if it be not void as to the other property in-

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cluded therein, it certainly is so as to the steamboats and the lighter, for want of recording in the custom-house in Wilmington, in conformity with the provisions of the Act of Congress, entitled an Act for recording the conveyances of vessels, &c., passed on the 29th day of July, 1850, and is found in the 9th vol. U. S. S., page 440, which is as follows: "That no bill of sale, mortgage, hypothecation or conveyance, of any vessel, or part of any vessel, of the United States, shall be valid against any person, other than the grantor, mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, or hypothecation or conveyance, be recorded in the office of the Collector of the Custom House, where such vessel is registered or enrolled."

"In reply to the defendant's last ground, the non-registration of the deed of assignment in the Custom House at Wilmington, it was urged in behalf of the plaintiffs, that this objection could not avail the attaching creditors of Metts, inasmuch as Joseph R. Blossom, himself, one of the attaching creditors, and also the accredited agents of Benjamin Blossom & Son, had actual notice of the execution, and the contents of the deed of assignment executed by Metts, prior to the suing out of the writs of attachment; and in support of this relied upon the following testimony:

"A bond, given in conformity with our Attachment Acts, dated the 6th day of August, 1855, and signed by Joseph R. Blossom & Laton, styling themselves agents of B. Blossom & Sons. Samuel Bell testified, that he was in Conwayborough when the steamer Fairy was attached; that he was served with a copy writ as Garnishee; that Joseph R. Blossom was present at the time, and said to witness that if Metts had not deceived him, he would have attached his property before he made his assignment; he also said that B. Blossom & Son, and himself, were in the third class of credi-

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tors in the assignment, which was the reason the attachments had been taken out.

"The case was submitted to the jury, who returned the following verdict: 'We find for the defendant, as to the steamboats, and for the plaintiffs as to the rest of the declaration, and assess the damages at one dollar.'"

The plaintiffs appealed on the grounds.

1. That actual notice of the assignment of the steamboats before the attachments were levied was brought home to the attaching creditors, and the verdict of the jury in favor of the defendant on this point is plainly contrary to evidence.

2. That a wrongful conversion of property to the amount of twelve thousand dollars, was not only proved, but admitted by the verdict, and the assessment of damages at one dollar only, exceeded the discretion of the jury.

Atkinson, Petigru, for appellants.

Harlee, Mitchell, contra.

The opinion of the Court was delivered by

WHITNER, J. The history of this case satisfies this Court that the juries charged with the matters in litigation between the parties, have encountered much difficulty in reaching a conclusion; a mistrial on one occasion, followed by what seems to us to have been a compromise, would be a sufficient warrant not to disturb the verdict, if grounds could be found on which to sustain it. The apparent anomaly suggested, in the second ground of appeal, has failed to satisfy us, that a new trial should be granted on this ground alone. The circumstances are very peculiar, and certainly place the matters in controversy, on grounds not likely to be drawn into prece-

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dent. It is manifest, that a verdict surrendering the slaves to the plaintiffs, and retaining the steamboat for defendant can only be sustained on the ground of *want of notice*, contemplated by the Act of Congress recited in the brief. On this point alone, the judgment of this Court is rested.

Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject matter of his agency; for upon general principles of public policy, it is presumed, that the agent has communicated such facts to the principal; and if he has not, still, the principal having entrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal, otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party. Such is the statement of a familiar principle to be found in *Stor. on Ag., sec. 140*, and fully sustained by authorities cited. The defendant, as Sheriff of Georgetown, had levied the attachment on the property in question. Representing the interests of the attaching creditors, to them must the fact of notice be brought. The plaintiff in one of the cases resided in Wilmington, N. C., and the plaintiffs, in the other case resided in New York. That the former had notice of the deed of assignment does not seem to this Court to admit of doubt. The deed had been recorded in the Custom House in Wilmington, and though a question might be raised whether the mere fact of registration in that office afforded conclusive evidence of notice to him of the assignment, yet taken in connection with his own declarations made in Conwayborough, all doubt vanishes as to the fact of knowledge derived through that or some other channel. He was not only apprised of the existence of a deed, but of its contents. The reason he gave, shows it clearly; for knowing as he did, that he and the firm in New York, were postponed to the third class, it by no means followed that an attachment should be resorted to for

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the purpose of securing these debts, unless accompanied with the further knowledge of the *extent* of the provision made for *that class* of creditors.

I am next brought to consider whether the New York firm may be saved from the operation of the rule. Joseph R. Blossom was the agent of the New York firm, *caused* their writ in attachment to be issued, gave the bond in conformity with the Attachment Act, styling himself *agent*, and his acts have not been repudiated; he was then the *accredited agent*.

It is objected that the admissions of the agent to Bell were not competent, and that the agent himself should have been called to testify. But he was also a party in interest and acting in concert with his principal, prosecuting the claims of each, and setting up these matters of defence through the sheriff for their joint benefit. The declarations were clearly competent. Did they attach as to the principal? To bind the principal such declarations must constitute a part of the *res gestæ*, otherwise they fall within the class of hearsay. But the proof was that the declarations were made at the very time when the thing for which he was constituted an agent was being done, at the levying of the attachment on the boat Fairy, and serving the witness Bell with a writ as Garnishee; within the terms of the rule, therefore, the agent was then engaged in the transaction of the very business of his agency and under the authority of his principal. Stor. on Ag., sec. 134, and cases there cited.

But if the agency had not ended, it remains to be enquired whether the notice to the agent was before the agency began, for in such case it is said, it will not *ordinarily* affect the principal. The reason of this rule is fairly to be collected from the authorities; for unless, *it is said*, the notice of the facts come to the agent while he is concerned for the principal and in the course of the very transaction or *so near before it* that the agent must be presumed to recollect, it is not notice thereof to the principal, otherwise the agent may have for-

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gotten it, and the principal would be affected by want of memory at the time of undertaking the agency. This case clearly does not fall within the reason of the rule, and the exception therefore, cannot avail the defendant.

The motion for a new trial is granted.

O'NEALL, WARDLAW, WITHERS, and MUNRO, JJ., concurred.

Motion granted.

Clayton vs. Butterfield.

D. B. CLAYTON AND WIFE vs. H. L. BUTTERFIELD.

Where several, as a father and his two daughters, come in company and put up at an inn, the goods of one cannot be detained for the board of all, but only for his or her own proportion.

Where a father and his two daughters put up at an inn, and the board of all is charged to the father, and he is sued for it, and, being held to bail, takes the benefit of the Insolvent Debtors' Act, the landlord has no lien upon the trunk of one of the daughters, for the board due him.

BEFORE O'NEALL, J., AT CHARLESTON, SPRING TERM,
1856.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of trover, to recover two trunks and a hat box, with their contents.

"The defendant is the keeper of the Pavilion hotel.

"William Thomas, with two of his daughters, Mary A., and the plaintiff who was then unmarried, came to the defendant's hotel on the 9th November, 1854, and remained until 3d January, 1855; his bill, after deducting payments, was two hundred and forty-six dollars and sixty-nine cents. When he and his daughters left, the defendant refused to deliver to the plaintiff's wife the articles for which this action was brought, claiming to have a lien on them, for the board of her father, herself, and sister. After her marriage with the plaintiff, he tendered her share, one-third of the defendant's bill for board, eighty-two dollars and nine cents. The defendant still, on demand, refused to deliver the articles, claiming to have a lien on them for the whole board of Thomas and his daughters.

"The articles sued for were proved to be the property of

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Mrs. Clayton, and their value was proved to be five hundred and sixty-seven dollars and twenty-five cents.

"The defendant sued Thomas for the whole bill, and held him to bail; he was arrested; applied for, and obtained the benefit of the Insolvent Debtors' Act. The jury were told, that if the plaintiff's right of property and the conversion were established, then, they would be entitled to recover, unless the defendant's lien could prevail.

"That the defendant had a lien on transient boarders' property, in his hotel, was indubitable. But I did not think, that because these persons came in company, the property of each became thereby liable for the board of all. Indeed, in this case, I did not see how the defendant could, *now*, set up his lien against the plaintiffs, for the following reasons:

1. He had charged Wm. Thomas alone with the board of himself and daughters.

2. He had sued him for the whole bill, and he had been discharged under the Insolvent Debtors' Act.

"In either point of view, there was no debt of Mrs. Clayton; and where there was no debt, there could be no lien.

"The value of the plaintiff's (Mrs. Clayton's) property consisting mainly of her wardrobe, in the trunks, was proved to be five hundred and sixty-seven dollars and twenty-five cents. Inasmuch as the plaintiffs had tendered one-third of the whole board, eighty-two dollars and nine cents, I instructed the jury, in their verdict, to deduct that much from the value proved. They accordingly did so; and found for the plaintiffs four hundred and eighty-five dollars and sixteen cents.

The defendant appealed, and now moved this Court for a new trial, upon the grounds:

1. Because, it is respectfully submitted, that his Honor

Clayton vs. Butterfield.

erred in charging the jury that the suit of the defendant against William Thomas destroyed his lien against the goods in his possession.

2. Because, it is respectfully submitted, that his Honor erred in charging the jury that the goods of each person could only be detained for their respective debts or bills; whereas, it is respectfully submitted, that under the case proved, the goods of all were responsible jointly and severally for the debt.

Mowry, for motion.

Anderson, contra.

PER CURIAM. This Court concurs in the instructions of the Judge below to the jury.

The motion is dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER, and MUNRO, JJ., concurring.

Motion dismissed.

Charleston, January, 1857.

COMMISSIONERS OF ROADS *vs.* JOHN RUMPH.THE SAME *vs.* J. W. CLARK.

The Commissioners of Roads ordered a road, which was in part new, and in part an old road to the use of which the public were entitled by prescription, to be opened and worked upon. The only landowner who objected was R. over whose land the old road ran:—*Held*, that R. had no right to object; and that R. and C. were properly fined by the Board, each in a sum over twenty dollars, for refusing to work on the road.

Where Commissioners of the Roads order a road to be opened and worked upon, and impose a fine, even over twenty dollars, for not working on the road, their action is conclusive. The party fined cannot object to their want of jurisdiction when an action is brought to recover the fine. The objection should be made at an earlier stage of the proceeding. *Semble*.

BEFORE O'NEALL, J., AT COLLETON, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

"These were *Sum. Pros.* to recover a fine of thirty dollars, imposed by the plaintiffs on the defendant Rumph and of twenty-four dollars on the defendant Clark. It was fully shewn that the defendants were warned to attend the Board, and on hearing Clark, who alone attended, the fines were imposed.

"It appeared that the Board had ordered a road to be opened, in connection with an old road, from the forty-one mile station on the South Carolina Railroad to the Indian Field Mill. There was no objection by any of the land owners, except defendant Rumph, and through his land the road had been immemorially used. The defendants contended they were not liable to the fines, inasmuch as the Board had no jurisdiction to order the road opened. I

Commissioners of Roads vs. Rumph.

thought this was within their jurisdiction—that this was not the opening of a new road so far as Rumph was concerned, and no other land owner, through which the road ran, made objection; and that having jurisdiction, their decision was final. I therefore gave decrees for the plaintiffs.”

The defendants appealed on the grounds :

1. Because it was not proved that the road, on which defendants were required to work, was a public highway, duly established according to law, and it is respectfully submitted that said road (as proved by the witness) was not within the jurisdiction or control of said Board, and that said Board has exceeded its prescribed bounds in the premises.

2. Because the Board had no right to open a road through defendant Rumph's land without his consent, and it is respectfully submitted, that in so doing, the Board violated the law, and their decision in the premises is not final and conclusive.

Williams, for appellants.

Henderson, contra.

The opinion of the Court was delivered by

WHITNER, J. The defendants insist that the Board of Commissioners exceeded their jurisdiction in ordering the road in question to be opened and worked upon. It appeared on the trial below that although one of the defendants through whose lands the contemplated road was to pass, did object, yet that through these lands there already existed a road, to the use of which the public had become entitled by prescription, and that the *new* road proper, passed through lands of those making no objection to the same, connected with the *old* road above referred to, and thus constituted the

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road established by the Board and taken under their jurisdiction. It will be noted, that this defence is set up in the summary jurisdiction, actions being brought to enforce the collection of fines imposed, exceeding twenty dollars each, for neglect of road duty, and this Court is given further to understand that in no other respect was the character of the *old* road changed. The defendants rely upon the fifth section of the Act of 1825, (9 Stat. 559) wherein the Commissioners of roads are "authorized and required to lay out, make and keep in repair, all such roads as have been or shall hereafter be established by law, or as they shall judge necessary in their several parishes and districts; *provided however*, that no Board of Commissioners of roads shall hereafter have power to *open any new road* until they shall have given three months previous notice," &c., "nor shall *any new road* be opened through the lands of any person who shall signify to the Board of Commissioners any opposition, unless by permission of the legislature," &c. When it is remembered that in this State we have two kinds of public roads, to the use and repair of which the public are entitled, if it may be assumed, as the judgment of the Court below warrants, that the road through the lands of the only person objecting, belonged either to the one or the other class of public roads existing amongst us, then I think it is manifest that the restriction in the proviso does not attach, either in the letter or spirit, to the action of this Board. In the recent legislation of the country, it has not been thought fit to delegate to the Boards of Commissioners, the power of taking private property for public use by opening a *new* road through the land of one who opposes this dedication to the public; properly this high prerogative is exercised by the legislature itself, and hence the restraint, but surely the reason ceases where the use exists, for the law presumes that portion of the road now drawn in question to have had its origin in

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some legal authority. 4 McC. 67; 2 Strob. 61; 1 McM. 271, 342.

It is no answer to this view of the case, that the fact on which it is based is denied, and therefore should be enquired of by a jury of the country. It was competent for the defendant Rumph to have raised the question, and secured such a course of adjudication. But with his arms folded, he has chosen to await this stage of the proceeding to interpose this objection, and it cannot now avail him, The presumptions are against him throughout.

In the incipieny of this transaction, a prohibition was open to him—a suggestion could have been ordered causing any disputed fact to be inquired of by the country. The road has been opened with the presumptions that the legal prerequisites have been complied with. *Commissioners vs. Murray*, 1 Rich. 335. When called before the Board to answer for his default, he failed to appear, and thence encounters the further difficulty of a fine imposed without objection, and the point ruled in the cases, 3 Hill, 318, 5 Rich. 278, viz., that when the person and subject matter are within the jurisdiction of the Board, (whose peculiar province it is to hear excuses and fix the fine,) their decision is final and conclusive, unless they exceed the bounds prescribed them, admit illegal evidence, or otherwise violate settled rules of law. In this particular case the defendant sets up matter by way of defence, wherein the facts are certified to this Court, and on which our judgment must be rested.

For the reasons already given, this Court is further of opinion that the grounds presented in behalf of the other defendant cannot avail him.

The appeal is accordingly dismissed in each case.

O'NEALL, WITHERS, and MUNRO, JJ., concurred.

Motion dismissed.

Charleston, January, 1857.

**THE SOUTH CAROLINA RAILROAD COMPANY *vs.* BRADFORD
& SANDERS.**

On receipts of the W. & A. Railroad Company, in Georgia, for twelve bales of cotton consigned to B. & S. in Charleston, and proof that the South Carolina Railroad Company usually received cotton sent as this was, and delivered it on such receipts in Charleston, B. & S. sought to charge the South Carolina Railroad Company for the twelve bales, alleging that they were lost :—*Held*, that the proof was insufficient,—there being no evidence at all that the cotton ever came into the possession of the last named Company.

BEFORE O'NEALL, J., AT CHARLESTON, SPRING TERM,
1856.

The report of his Honor, the presiding Judge, is as follows:

“This was an action brought to recover back money paid by mistake. The defendants claimed payment for twelve bales of cotton, marked N. U., which they alleged the Company, the plaintiffs, had failed to deliver; the money was paid according to the claim. It turned out that all the cotton of the brand N. U., which the plaintiff, as a carrier, had undertaken to deliver, had been delivered to the defendants.

“They pleaded a discount, that there were other twelve bales for which the plaintiff, as a carrier, was liable, and which had not been delivered.

“The cotton thus claimed had been placed on the Western and Atlantic Road, at Chattanooga, and the receipts produced by the defendants were of the character of the one hereto annexed.

“No receipt of the South Carolina Railroad was produced, nor was there any evidence that that Road had the cotton alleged to be lost in its possession.

 Railroad Company vs. Bradford & Sanders.

"I therefore held, that the South Carolina Railroad Company could not be charged for short delivery, on a mere receipt of the Western and Atlantic Railroad. If the South Carolina Railroad Company could be liable *at all*, on that receipt, it must be shown that it was a joint contractor, or carrier, with the Western and Atlantic Railroad, and then the discount could not be set up against the South Carolina Railroad alone. So that, until the South Carolina Railroad Company was in some way shown to have been in possession of the cotton lost, it could not be chargeable.

"Mr. Robinson proved that the South Carolina Railroad Company usually received cotton sent as this was; and Mr. Simons, the drayman, proved that the South Carolina Railroad Company delivered the cotton contained in the receipts as far as it acknowledged it had it in possession. But the pinch of the defendants' case was, that there was no proof whatever that the South Carolina Railroad Company ever had a bale of the cotton consigned to the defendants, *in its possession*, more than it delivered.

"The discount was therefore not allowed, and the plaintiffs had a verdict for the money paid by mistake."

(Copy Receipt.)

Original.]

Chattanooga.

Western & Atlantic Railroad.

To Georgia Railroad.

No. 220—February 20, 1854. Received from D. Moore, twelve (12) bales of Cotton, consigned to Bradford & Sanders, at Charleston.

Marks.	Bales.
G. V.	12
Entered.	—
	Total, 12

Expenses to be Collected at Destination, \$

To be transported, in turn, on the Western and Atlantic

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Railroad to Atlanta, and delivered to the agent of the Georgia Railroad, under the following stipulations, viz: Roads liable for such injuries only as shall be established to have occurred while in their possession. Liability of roads, either for damage or loss, not to attach until the Cotton is laden on the cars, and to cease on the unloading of the same at its destination. That this receipt be exhibited at the depot at the point of destination for registry, before delivery of the Cotton, which will be subject to regular rates of storage, (payable by Consignee,) unless removed within forty-eight (48) hours after it is unloaded from the cars.

Exceptions:

Condition of Contents unknown.

Registered by J. Welch, Agent.

R. Campbell.

The defendants appealed, and now moved this Court for a new trial on the grounds:

1. Because, *ex equo et bono*, the plaintiffs were not entitled to recover, inasmuch as it was proved that the money claimed for the twelve bales, marked N. U., was due for twelve bales in other marks short delivered.

2. Because the Judge erred in non-suiting the defendants in their discount, on the ground that it was founded upon a joint contract, and could not be recovered from the plaintiffs, for the following, among other reasons:

First—Because it was proved by Mr. Robinson that the South Carolina Railroad Company had received the Cotton, as carriers from Hamburg to Charleston.

Secondly—Because it was proved by Mr. Simons that the

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receipts given by the Western and Atlantic Railroad Company were the only evidences given or required by the South Carolina Railroad Company in 1854, for cotton carried on their railroad from Chattanooga to Charleston, and that it was the usage of the road to deliver on these receipts.

Thirdly—Because it was proved by Mr. Davis that the twelve bales of N. U., cotton were delivered on similar receipts.

Fourthly—Because the receipts themselves were introduced merely to show the marks; that they do not negative the separate liability of the South Carolina Railroad as carriers, created by their acceptance of the cotton at Hamburg, and receipt of freight for the carriage.

Memminger, for appellants.

Conner, contra.

PER CURIAM. This Court concurs in the ruling of the Judge below.

The motion is dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER and MUNRO, JJ., concurring.

Motion dismissed.

Charleston, January, 1857.

EDMUND H. HOLMES *vs.* JOHN CALDWELL.

C. in order to induce H. to do the draying business of a firm of which C. was a member, assured him that he should have all the business of the firm, and that he would have as much as he could do for a year or two. H., thus assured, undertook the business, and incurred considerable expense in purchasing slaves, horses, drays, &c. In about five months the firm was dissolved and a new one formed, of which C. was not a member. The new firm gave their business to another: Whereupon H. brought an action on the case against C. for the loss he had sustained by reason of the false representation as to the time he was to have the business. Non-suit ordered, there being nothing in the evidence showing that C's. declarations were not made in entire good faith.

BEFORE O'NEALL, J., AT CHARLESTON, SPRING TERM,
1856.

The report of his Honor, the presiding Judge is as follows:

"This was stated to me as an action on the case. The declaration was read, and as I gathered its statements, it seemed that the plaintiff alleged that the defendant was a member of the firm of R. & J. Caldwell & Co.; that the plaintiff was a clerk in the same house, sampling cotton, &c., which profitable employment he gave up to embark in draying, under the circumstances following: Felix Meetze had the contract of draying for the house for many years previous; his health failed and he was desirous of giving up the business; that under the expectation held out by the defendant that he should have the draying for the firm, he, the plaintiff, bought out Meetze's stock, the defendant assuring him that the firm would continue for at least two years longer. That in fulfilment of his contract with Meetze the plaintiff gave to R. & J. Caldwell his note for five hundred dollars, the balance of Meetze's debt to the firm. The

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plaintiff assumed the draying in April, 1852, and continued it till October of the same year, when the firm, having been dissolved, it (the draying) was given to another.

"This is a sort of synopsis of the case, as stated in the record. The declaration, however, should be printed with the report.

"Felix Meetze proved: That he lived in Columbia before he removed to Charleston; that John Caldwell also lived *there*; R. Caldwell lived in Charleston. In 1843 or 1844 he (F. M.) commenced buying cotton and shipping it to Charleston; he failed in 1845. He owed R. & J. Caldwell five thousand two hundred dollars. He said he came to Charleston to pay the debt by draying cotton at twelve and a half cents per bale for the firm. He did the draying for seven or eight years; an average of thirty thousand bales per year. He appropriated a large portion to the payment of his debt to them. His debt to them stood on bond three thousand dollars, secured by several of his friends; the balance, two thousand two hundred dollars rested on himself alone. This debt, in both parts, was closed in 1852—August. He, the witness, sold out to the plaintiff, to enable him to arrange with the defendant, whose health was bad, and who wished the debt settled.

"He, Meetze, told Caldwell the defendant, that he was in debt to Holmes the plaintiff, as well as himself; that he could make a better sale to the plaintiff if he could have his contract for draying than he could to any body else. The defendant said any one who would buy should have the business. He, Meetze, said he perhaps might have finished the payment of his debt to R. & J. C. in about two years. He Meetze, Caldwell the defendant, and Holmes the plaintiff, met at the Charleston Hotel in the defendant's room. He, Meetze, told the defendant that he and Holmes the plaintiff had agreed for four slaves, ten drays, nine horses, and licenses, provided he, the defendant, would give the plaintiff the busi-

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ness. He, defendant, said he was perfectly satisfied. He, Meetze, said to Caldwell, the plaintiff was afraid Wells might encroach on his business. The defendant replied, as to the business of Wells and Anderson and another, he would not have anything to do with it, but as to the balance of the business consigned to R. & J. Caldwell *here* (Charleston) and in *New York*, the plaintiff should have it: that he would have as much as he could do for a year or two. He, Meetze, asked the plaintiff if he was satisfied, or wished some writing. The defendant replied, I hope, gentlemen, we all understand one another. The witness, Meetze, said, the plaintiff would not have bought without this arrangement. He, the witness, owed the plaintiff four thousand two hundred dollars: they had been draying together: he gave his note for the balance, eight hundred dollars. He sold a farm afterwards to satisfy the defendant, subject to a lien in favor of Cordes: he paid two thousand five hundred dollars cash to the defendant; for the balance four hundred and eighty-nine dollars, they (R. & J. Caldwell) agreed to take the plaintiff. The plaintiff accordingly gave his note: *he was to work it out*. Holmes, he said, built a long stable and a hay house. The plaintiff did the business till October, 1852. He, the witness, resumed draying in the fall. He said Wells came with the orders for cotton of R. Caldwell & Co. The defendant, he said, said nothing about the partnership being dissolved. The defendant said the house in Charleston would not do as heavy business as it had done; but he thought the house in New York would do a heavy business. He, Meetze, said, the plaintiff was to have the business of both.

"This witness, on his cross-examination, stated that he had taken the benefit of the prison bounds and bankrupt laws. He bought the negroes, which he had in the draying business, and gave R. Caldwell a mortgage for their price, another balance of his debt, which was not secured by bond for three thousand dollars—executed before he began to buy cotton.

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His sureties gave renewals on condition of his coming to Charleston. The plaintiff, he said, had been his partner for two years: he was also a sampler of cotton, he said, in the house of R. & J. Caldwell. He said he drayed for Dulin from 1852 till 1854; he said he had no such interest in it as he could sell. He said the defendant did not request him to get any one to do his business. He did not settle with the defendant for several months after he sold to the plaintiff; i. e. he sold in April, and paid the defendant, or R. & J. Caldwell, in August. He got six hundred dollars for his property from the plaintiff more than he could from any one else. He said he sold his farm for five thousand dollars; his property was sufficient to pay his debts. He did not represent that he was insolvent. Scott, one of his sureties was good for one thousand dollars. R. Caldwell gave up Scott's bond, and charged it to the witness before he sold. The defendant wished the debt paid: the witness said he, the defendant, might have discharged him from draying; but if so he, the witness, would not have felt himself bound to pay the debt. He would not of himself have abandoned the draying contract without paying the debt. He said he thought the defendant would have refused to sign the written contract which he, the witness, suggested, when Caldwell replied, "I hope, gentlemen, we all understand one another." He said he thought one thousand five hundred dollars or two thousand dollars could have been made per annum on the draying contract.

"Charles Wm. Simons proved that he lived in Charleston. He knew the plaintiff in 1852, which was a very sickly season: business was dull. He said he knew the plaintiff got Meetze's stock. In October, 1852, Wells, he said, did the business (draying) for R. Caldwell & Co. The plaintiff was much chagrined at the business being taken from him. He might have cleared two thousand dollars per year.

"The plaintiff here closed, and the defendant moved for a non-suit, on the grounds that no fraud was either alleged or

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proved; and that assumpsit would not lie on the facts proved.

"I sustained the motion."

The plaintiff appealed, and now moved this Court to set aside the non-suit, on the grounds:

1. Because the defendant misrepresented the period for which the firm of R. & J. Caldwell was to last; and in the position of the parties, this was a fraud.

2. Because the defendant promised the plaintiff that the balance of the purchase money of Meetze's negroes, stock, etc., for which the note was given, should be worked out by the draying contract, and the dismissal of the plaintiff within three months, was a fraud upon him.

3. Because the whole conduct of the defendant was calculated to deceive and injure, and did, in fact, deceive and injure the plaintiff, and this was, therefore, fraud in law, whatever may have been the motives.

4. Because all the circumstances taken together, as Meetze details them, shewed an intention on the part of defendant to deceive plaintiff into the expectation of a long continuance of the draying contract for his own advantage, and such conduct was fraudulent and injurious.

5. Because the plaintiff proved fraud in the defendant, and injury to himself, and he was therefore entitled to maintain this action.

6. Because upon the proof, the Court should have referred to the jury, whether the defendant's conduct was fraudulent.

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7. Because the non-suit was, in other respects, contrary to law and evidence.

Martin, for appellant.

Petigru, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case, as now presented, and as it is now admitted to be, an action of deceit, with every proper allegation made in the declaration, (which has been unfortunately lost) the only question is whether a fraud has been proved.

I suppose the plaintiff is now to be considered as averring that to aid Meetze, in his sale to the plaintiff, and to induce him to make the purchase, the defendant, a partner in the house of R. & J. Caldwell, represented to him, that the business of that house here, and in New York, would be as much as he could do, in draying for a year or two, that he should have their draying, and that the firm would continue that long, and that he knew that this was false: that the plaintiff, confiding in such representation, made the purchase, and that the firm was dissolved in a few months, whereby he lost the draying, and sustained damage.

Everything is conceded to the plaintiff except the fact of fraud. There is no proof whatever, that Caldwell knew or contemplated the dissolution of the firm. The plaintiff had the drayage of the house of R. & J. Caldwell, to the dissolution of the firm, when the defendant ceased to be a member, and a new firm with other members entered upon the business, for he could not and did not control their draying. The plaintiff lost it, and thereby sustained damage, but that cannot be charged to the defendant.

In this case there is no such "false affirmation" made by

Charleston, January, 1857.

the defendant with "intent to defraud the plaintiff," as was found in *Pasley vs. Freeman*, 3 T. R. 51. Unless that could be found, there is no ground on which the plaintiff can stand. So far as the proof goes, the defendant made no assertion, which was not true, the plaintiff was to have and did get the business of R. & J. Caldwell. This the defendant gave as his opinion would be as much as he (the plaintiff) could do for a year or two. There is no objection to the quantity of the business, but it did not last long enough. Unless the defendant had known that the firm was to be dissolved in less time than a year or two, there can be no pretence of his liability, by making a false affirmation. There is not the slightest proof of such knowledge. There was nothing therefore in the case to go to the jury.

The motion is dismissed.

WARDLAW, WITHERS, WHITNER and MUNRO, JJ., concurred.

Motion dismissed.

Haynes vs. Prothro.

W. HAYNES vs. N. B. PROTHRO.

An independent demand for unascertained damages arising *ex contractu*,
held to be admissible as set-off.

BEFORE MUNRO, J., AT CHARLESTON, OCTOBER, 1856.

The report of his Honor, the presiding Judge, is as follows:

"This was a summary process for work, labor, and materials. The plaintiff proved his demand. The defendant set up as a discount, damages arising from the breach of the following independent contract:

"Charleston, October 18th, 1855.

"I hereby agree with N. B. Prothro, to fill his Water Lot, fronting on Washington street, about fifty feet, and extending east from said street to the east end of office belonging to said Prothro, being two hundred and ten feet, more or less; and from the bridge on south line, to lot filled up on North line. The above Lot to be filled with sawdust and chips or shavings, with one foot in depth on the top, of solid filling, such as dirt, or dirt and brickbat mixed, not being objected to by said Prothro; when completed to be within six inches of the top of bridge on the south side, of the same height and level all over.

"The work to be completed by 1st of May, 1856, and the same to be paid for in full on the first day of May, 1856, at the sum of three hundred and twenty dollars.

"WM. HAYNES.

"I agree to give the above price for filling said Lot, on the condition above mentioned.

"N. B. PROTHRO.

Charleston, January, 1857.

"The testimony was conflicting as to whether this lot was properly filled according to the contract, or not. The witnesses for the defendant, however, testified, that the plaintiff had agreed to do other work in the place of that, which defendant complained had not been done under the contract. This other work was never done. The value of it was estimated at about eighty dollars. There was a balance due on the original contract, which made the amount about the same. I decreed for the defendant."

The plaintiff appealed, and now moved this Court for a new trial, on the grounds ;

1. That the discount filed, was not properly admissible.
2. That the plaintiff's claim was fully made out; and the defendant having filed a discount, and being bound to prove every thing necessary to maintain his discount, failed therein. The strong weight of evidence being that the contract in Washington street had been fulfilled.
3. That the defendant should have been confined to evidence of damage arising from failure of plaintiff to fill defendant's lot in Washington street; whereas there was no proof of such damage, or the amount thereof; and that evidence of purported promises of plaintiff to do other work, outside of the contract, and of the value thereof, was not properly admissible under the discount filed, and took the plaintiff by surprise.

Thos. Y. Simons, Jr., for the motion :

1st. Unliquidated damages, arising from the breach of an independent contract, are not proper subjects of discount. The class of cases of which *Ewart vs. Kerr*, Rice Rep. 206, is the representative, were dependent mutual contracts.

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In *Whisehart vs. Towers*, 2 Rich. 110, the amount was liquidated and fixed by the contract.

Cited in support, *Cook vs. Rhine*, 1 Bay, Rep. 16; *Mitchell vs. Gibbes*, 2 Bay, Rep. 120; *Lightner vs. Martin*, 2 McC. Rep. 214; A. A. 1759, P. L. 247.

2nd. There was no evidence of damages from alleged breach of contract.

3d. The evidence of promises to do other work, outside of the contract, was incompetent, and acted as a surprise, and if competent, then insufficient.

Whaley & Lord, contra, cited, *Richardson vs. Provost*, 4 Strob. 58; Dud. 60.

The opinion of the Court was delivered by

MUNRO, J. We can perceive no such discrepancy between the defendant's discount, and the evidence that was adduced to sustain it, as was calculated to take the plaintiff by surprise, and therefore proceed at once to the consideration of the plaintiff's second objection, which is, that unliquidated damages arising out of an independent contract, are not admissible by way of discount, under the Act of 1759.

A defence which arises out of the plaintiff's cause of action, can with no sort of propriety be termed a discount, or set-off. Technically speaking, a discount is a counter demand, which the defendant holds against the plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action.

It is true, that failure of consideration, a defence which arises out of the plaintiff's cause of action, as for instance, a deficiency in the quantity, or a defect in the quality of a commodity sold; and that which is the subject matter of discount, technically so called, are not unfrequently confounded, and

Charleston, January, 1857.

no small amount of *dicta* to that effect is to be found in our own reported cases. The distinction between these two modes of defence is, however, well taken by Judge Nott, in the case of *Lightner* *ads. Martin*, 2 McC., 214, where he says—"The defence of unsoundness of property which is allowed to be set-off against a note of hand, or a bond, is usually, but I think improperly, considered a set-off. A set-off means a counter demand which the defendant has against the plaintiff; and although our set-off Act is very comprehensive in its terms (embracing every cause, matter or thing,) yet it has always been restricted in its construction to damages arising on contracts."

But it is argued, that nothing but liquidated damages are admissible under our discount Act.

If by the phrase "liquidated damages" or "liquidated demands," it be meant, that nothing can be set up as a discount, except a bond, a note, or an ascertained debt due from the plaintiff to the defendant, then is the remark of Judge Nott, as to the comprehensiveness of our discount Act, founded in error. Certain it is, that nothing can be found, either in the language of the Act, or in the practice of our Courts, to prevent such a construction. On the contrary, it has never been doubted, but that to an action, either upon a liquidated, or unliquidated demand, it was competent for the defendant to set up in discount, a demand for work and labor, or services rendered, founded upon a *quantum meruit*. If then it be competent for a defendant to rely upon such unliquidated demand, what good reason can be assigned for excluding a claim for damages arising out of the plaintiff's failure to perform a similar undertaking.

Without affirming that any matter arising *ex contractu* may be the subject of discount; this much we may venture to affirm:

1. Neither the cause of action, nor the discount must be the offspring of a tort, but must arise *ex contractu*.

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2. They must be mutually subsisting demands, at the time the action is brought.

As this view may seem to conflict with what is said in the case of *Gibbes vs. Mitchell*, 2 Bay, 351, it may be proper to notice it more particularly. In speaking of the discount Act, it is said, "The discount law never meant, that torts, trespasses, or any unascertained damages, should be set off. That it contemplated debts, dues, and demands of a pecuniary nature, or something springing out of a contract, where there were mutual covenants, which depended one upon the other, and no other kinds of discounts had ever been offered, or allowed in our Courts of justice."

Now the discount that was set up in that case, consisted of three items, two of which were for torts, and the third for money had and received; and the only question the Court was called upon to decide, and the only one which it professed to decide, was, that the demand for money had and received was admissible as a discount, but that the torts were not; so that all that is said about unascertained damages, and mutual covenants, is purely *obiter*.

We are therefore of opinion, that the defendant's discount was clearly admissible under the Act of 1759, so that the plaintiff's motion must be dismissed; and it is so ordered.

O'NEALL, WARDLAW, WITHERS, and WHITNER, JJ., concurred.

Motion dismissed.

Charleston, January, 1857.

JOSEPH LAWTON & Co. *vs.* W. F. & S. P. MANER, Ex'ors.

M. wrote to L. & Co. :—Mr. B. informs me, that, in a conversation with Mr. S. of your firm, he stated to B. 'if he would get me to be responsible for him to you, or in other words to give B. a letter of credit to you, he would sell him on longer time, say nine months or one year. This is therefore to inform you that I will be responsible for B. to the amount of one thousand dollars':—*Held*, to be a continuing guaranty until goods to the amount of one thousand dollars were purchased, but no longer.

The goods were purchased from time to time, in separate parcels, and for each parcel B's note was taken at six months:—*Held*, that the taking of notes was no waiver of the right to resort to M.; and that it was not a condition of the guaranty that at least nine months credit should be given to B,

M. was *held*, not to be liable for interest.

BEFORE WHITNER, J., AT. BEAUFORT, SPRING TERM,
1856.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of assumpsit, brought to recover for goods sold and delivered to F. B. Baker, on a guaranty of defendant's testator, as contained in a letter of which the following is a copy; "Brighton, S. C., Feby. 6th, 1851.—Messrs. Joseph Lawton & Co.—Gentlemen: Mr. Baker informs me he had a conversation with Mr. Smith (of your firm) in which he stated to Mr. Baker, if he would get me to be responsible for him to you, or in other words, to give Mr. Baker a letter of credit to you, he would sell him on longer time, say nine months or one year. This is therefore to inform you that I will be responsible for Mr. Baker for the amount of one thousand dollars (\$1,000). Respectfully,

Lawton vs. Maner.

John S. Maner." Goods were sold and delivered by plaintiffs to F. B. Baker, to wit:

11th February, 1851, amount	\$581 61
29th April, 1851, "	186 32
23d October, 1851, "	360 82
4th March, 1852, "	341 25

Amounting in the whole to	\$1,470 00
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"These accounts were each liquidated by notes at six months, the first being credited,

17 January, 1852, with	\$200 00
24 March, 1852, "	304 08 504 08

Leaving a balance on account purchases,		\$965 92
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"These items appear from the bill of particulars, admitted to be correct, though on the trial it was stated generally, amount of account, \$1,470 00

Amount of credits	508 08 \$961 92
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Amount for which I think verdict was rendered with interest. It was in evidence that Mr. Baker and Major Maner in 1849, 1850, 1851 and 1852, lived in the same neighbourhood, in St. Peter's Parish, on terms of great intimacy, the former engaged in a small mercantile business, first at Bishopville, within two miles of the latter, and afterwards at Brighton, in a house built on lands of Major Maner, seven miles distant from him, and by which Major Maner passed frequently on his way to his plantation. Baker was a man of limited means, and continued in business at Brighton until and for a short time after Major Maner's death. The latter was a man in affluent circumstances. He died June, 1852. After the death of Major Maner, the defendants addressed a letter to the plaintiffs on this subject, to wit: 'Brighton, June 22d, 1853. —Messrs. Joseph Lawton & Co.—Gentlemen: We received your letter a few days since, and would have replied sooner but waited to see Mr. Baker, who says he is unable to do

Charleston, January, 1857.

any thing at this time, but will try to make arrangements to have a settlement with you next fall. If he fails in so doing, we will endeavor to make your claims against him good. Please inform us how this arrangement will suit you. Very respectfully, W. E. & S. P. Maner.' A letter was also read from attorney of executors, January 23d, 1854, asking a statement of these claims, of which I took no other note.

"The plaintiffs claimed to recover the entire balance of these purchases, with interest, and defendants, resisting all liability on the guaranty for want of notice of its acceptance, insisted that at most the recovery should be limited to the amount of first parcel of goods taken up, less the sums paid by Baker. I did not think either view gave the true amount for which defendants were liable, but for the purpose of ending the litigation on this subject, I thought it better, after the jury had passed upon the question of notice, to direct a general verdict for the balance of the amount of purchases with interest. My own impression is that there was a continuing guaranty until the sum of one thousand dollars should be taken up in the purchase of goods, and that any sums subsequently paid on account of their dealings, should enure to the benefit of the guarantor, and to that extent discharge the guaranty, the true sum being four hundred and ninety-six dollars and ninety-two cents, with interest thereon.

"On the subject of the notice of acceptance of the guaranty, the jury were instructed in conformity with the principles set forth in the opinion delivered when this case was before the Court of Appeals, January Term, 1856, and this question was resolved by the jury in favor of plaintiffs.

"My attention was not called to the points raised in the sixth and seventh grounds of appeal, on the circuit, nor was I aware of the terms of the notes given, until I was furnished with the bill of particulars, and grounds of appeal. The

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fault was, perhaps, my own, but, at least, the defendants should not be prejudiced."

The defendants appealed, and now moved this Court for a new trial, on the grounds

1. Because His Honor erred in charging the jury that the writing declared on was a continuing and not a limited guarantee, and the jury erred in so finding.

2. Because his Honor erred in charging that the plaintiffs were entitled to recover, under a guarantee limited to one thousand dollars, the difference between the plaintiffs' entire demand, (which greatly exceeded that sum) and the payments made by Baker; and the verdict of the jury rendered in conformity thereto, was erroneous, it being respectfully submitted, that, under no construction of the guarantee, could the plaintiffs be entitled to recover more than the difference between one thousand dollars and the payments made by Baker.

3. Because his Honor erred in not charging the jury that the claim of the plaintiffs against the defendants was limited to the amount of the first parcel of goods taken up by Baker, diminished by the amount of the payments made by him; and the verdict of the jury in finding a larger sum, was erroneous.

4. Because his Honor erred in charging, and the jury in finding interest on the amount claimed by the plaintiffs.

5. Because there was no sufficient evidence of notice to the guarantor that his guarantee had been accepted, upon which to found a verdict for the plaintiffs.

6. Because the plaintiffs, by taking notes from Baker for

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the amount of his purchases, waived whatever other rights they might have otherwise had against the guarantor, by virtue of his guarantee; and his Honor erred in charging and the jury in finding otherwise.

7. Because there was no evidence of any credit having been extended to Baker by the plaintiffs on the faith of Maner's guarantee—the bill of particulars exhibiting an indebtedness by Baker, as agent, and the credit being limited to six months, and his Honor should have so charged the jury.

8. Because the charge of his Honor and the verdict of the jury were in other respects contrary to law and to the evidence.

Fickling, for appellants. Even if entitled to recover any thing under this guaranty, the claim of plaintiffs is limited to the amount of the first parcel of goods taken up by Baker diminished by the amount of payments made by him. This is a limited and not a continuing guaranty. In order to ascertain the nature of the instrument, we must look to the intention of the parties, so far as it can be gathered from the language used. Formerly it was held that a guaranty must be most strictly construed against the guarantor, but the rule as above laid down is now recognized by the Courts both in this country and in England. What then was the intention of the parties? If we scrutinize the language of the guarantee, we shall not be able to find a single expression which contemplates a continuous dealing between Baker and Lawton & Co. The language of this instrument is still more limited and carefully guarded, than the language of the instrument upon which the Court passed in the cases of *Boyce & Henry vs. Ewart*, Rice, 126; *Rogers &*

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Lambert vs. Warner, 8 Johns. R. 92; 3 Barn. & Ald. 595; 1 Bail. 620; yet these were all held to be limited guarantees.

The defendants at least are not liable for *interest*. *Bishop vs. Ross*, Rice, 21.

But was Maner liable at all? The whole course of dealing between the parties shows that no credit was extended to Baker, by the plaintiffs, on the faith of Maner's guarantee. The notes taken from Baker, if not a liquidation of the original debt, prove that Lawton was dealing with Baker on his own responsibility. The account was charged against Baker as agent. Maner agreed to guaranty payment for goods purchased by Baker for his own use—not those which Baker might purchase as agent of another. The condition of Maner's guarantee was that Baker should have a credit of nine months. This condition not having been complied with, the guarantor is discharged. 15 Eng. C. L. R. 514; 19 Eng. C. L. R. 479; 25 Eng. C. L. R. 413. An express condition is to be extended to all parts of the contract. 52 Eng. C. L. R. 643.

Treville, contra. The undertaking of Maner was a continuing guaranty. This is evident from the nature of the instrument which is a "letter of credit," given to a country merchant, addressed to merchants in the city, and which must therefore, be supposed to contemplate a series of transactions. This case cannot be distinguished from the case of *Mason vs. Pritchard*, 12 East, 429, and the cases cited in Chitty on Contracts, 525. The case in 3 Barn. & Ald. 595, has been shaken by subsequent adjudications and is not now regarded as authority. Chitty on Contracts, 525. The case of *Boyce & Henry vs. Ewart*, Rice, 126, was decided on another ground. Upon this point the Judges could not agree.

Charleston, January, 1857.

The opinion of the Court was delivered by

WARDLAW, J. This Court is satisfied with the finding that the defendant's testator had notice of the acceptance of his guaranty. See former opinion in this case, 9 Rich. 335.

The matters contained in the sixth and seventh grounds of appeal were brought out on the trial, although, under the pressure of circumstances which limited time on the Circuit, they were not urged in argument there. They are now properly before this Court, and have been considered.

As a promissory note does not extinguish an open account, unless it has been paid or accepted in payment, the fact, that the plaintiffs took from Baker his note for each parcel of goods delivered, shows no waiver of their right to resort to the guarantor. The circumstance, that in the bills of parcels, Baker is styled "agent," is equivocal and indecisive. It appears by the notes that credit in each instance was given for only six months, and this is more important. The guaranty speaks of "longer time, say nine months or a year." It does not appear what was the credit that had been previously extended to Baker, and a *longer* credit was probably given when six months were allowed. One who would avail himself of a guaranty must comply strictly with its conditions, but that which is urged as a condition must appear by fair construction to have been intended to modify the obligation. In this guaranty the specification of "nine months or a year," under the general expression of "longer time," seems too loose to raise a condition that the credit should be at least nine months; and the whole may be fairly construed to be mere inducement. Because Baker had made communication to Maner of what Smith had held out, *therefore* Maner was willing to give his "letter of credit." The extent of advantage which Baker should derive from the letter, was left to negotiation between him and the plaintiffs.

Upon the question which has been mainly argued, this Court looking to all the terms of the guaranty and the cir-

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cumstances which surrounded the parties, is of opinion that the guaranty was limited to the amount of one thousand dollars, but was continuing until that amount of goods was received by Baker on credit; that it was not confined to the first parcel or first transaction, nor extended to the whole course of dealings, so as to cover a final balance of one thousand dollars or less.

The many cases which have been cited, stand each upon its own words and circumstances. In this case, a philological analysis would not carry conviction of the correctness of the conclusion we have attained, if a careful reading of the guaranty and remembrance of the various relations of the parties stated in the report, should fail to establish such conviction.

"Letter of credit" and the nature of the dealings between a shopkeeper and a jobber, are strong to show that more than a single transaction was contemplated: the absence of *time to time, any*, and other like terms which ordinarily are used to embrace all future dealings, shows that the specified amount was intended to limit the whole responsibility which from beginning to end the guarantor would assume.

It follows that from the one thousand dollars, should have been deducted the payments made by Baker of five hundred and four dollars and eight cents, to which the guaranty had attached, so as to leave a balance of four hundred and ninety-five dollars and ninety-two cents, yet covered by it. Upon that balance, interest from the expiration of the credit given, or from the demand made upon the guarantor's executors, has been claimed by the plaintiffs, and with much apparent justice. But according to our case of *Bishop vs. Ross*, Rice, 21, no interest can be recovered. The guarantor's liability arose from Baker's default to pay for goods sold to him; the guaranty was not of notes, but of an account; it is in writing and therefore binding, but the writing does not affect the character of the debt it was intended to secure; as interest

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could not be recovered on an account for goods sold, so it cannot be recovered on a guaranty of such an account. This view was taken in *Bishop vs. Ross*, and we will not now examine its propriety.

It is therefore ordered that a new trial be granted, unless the plaintiffs enter a *remitter* for all that has been found for them by the verdict, beyond four hundred and ninety-five dollars and ninety-two cents.

O'NEALL, WITHERS, WHITNER and MUNRO, JJ., concurred.

New trial, nisi.

Carmichael vs. Buck.

D. W. CARMICHAEL vs. HENRY BUCK.

C. employed H. to take a raft of timber down the Pee Dee river, and deliver it in Georgetown to his factor. H. before reaching Georgetown, represented himself to be the owner, and sold the timber to B.; and this was an action of trover by C. against B. for the conversion:—*Held*, that if B. could show that he purchased in entire good faith supposing H. to be the owner; that he really appeared to be the owner, and that C. by his acts enabled him so to appear, that then B. would not be liable.

The general rule of the common law is, that an innocent purchaser of personal property from one having no title, acquires no right as against the rightful owner, except in case of a purchase in market *overt*, and there is no such thing as market *overt* in this State.

In cases of agency the general rule also is, that a special agent can bind his principal only to the extent of the authority conferred: nevertheless, where one deals with an agent, whether general or special, in ignorance of his private instructions, the principal is bound if the act of the agent be within the scope of the authority which the principal holds him out to the world to possess.

Where an agent in possession of goods for a special purpose but without authority to sell, claims to be the owner, and sells them to a stranger, who purchases in entire good faith supposing the agent to be owner, such purchaser may protect himself against the claim of the owner, by showing that he, the owner, so acted, negligently, or fraudulently, as to enable the agent to appear to the world as owner, and that he the purchaser was really deceived by such appearances.

BEFORE MUNRO, J., AT HORRY, SPRING TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

“Towards the latter part of the month of May, 1854, the plaintiff, who it appears, is a resident of Marion District, employed one Robt. H. Huggins, who is also a resident of that District, to carry a raft of timber down the little Pee Dee river to Georgetown, with verbal instructions, to deliver to

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Mr. Shackelford, a factor in that place, and upon its delivery, to take Mr. S.'s receipt for it; and for his services in so doing, the plaintiff was to pay him the sum of twenty dollars.

"Huggins started with the raft, taking with him his brother, Wm. Huggins, to assist him in carrying it down the river. Instead, however, of his carrying the raft to Georgetown, he stopped at one of the defendant's timber depots on the river, where he offered it for sale to a Mr. Duzenberry—a copartner of the defendant—to whom he represented himself as the owner of the timber; it having, as he alleged, been cut by himself, with his brother's assistance; and that his object in disposing of it was to enable him to raise the means to pay the costs of a prosecution, that was then pending against him in the Marion Court. Upon the faith of these representations, Duzenberry agreed to purchase the timber; and after measuring it, drew an order on the defendant for the amount, one hundred and fifty dollars, by whom it was paid to Huggins.

"When the plaintiff heard of the disposition that had been made of his timber by Huggins, he forthwith proceeded to demand it of the defendant, who refused to deliver it up: upon which the present action was brought to recover its value.

"On Circuit, the defendant rested his defence, mainly upon the grounds set forth in his first and second grounds of appeal; and in reference to the existence of the custom therein referred to, adduced the following testimony:

"*Wm. Bullard, said*—that he had been thirty years in the timber business, and for the last three years had been acting as the defendant's agent, in the purchase of timber; that the universal custom was to purchase timber from the person in possession, and to settle with him for it.

"*Col. Jas. Beaty.*—Had been in the habit of purchasing timber for himself, and as agent for others, for more than twenty years; and that he had almost invariably treated

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the person in possession of the raft as the owner, and arranged with him accordingly.

"*U. A. De Lettere*.—Had acted as the defendant's agent, in the purchase of timber, for six or seven years; that he generally purchased from, and paid the party in possession of the raft, and had never heard the custom questioned, until the case of *Powell vs. Buck* .

"*Elly Godbold*.—Had also been the defendant's agent for four years, and concurred with De Lettere and the other witnesses as to the custom.

"In reference to the defendant's third ground, the only witness who said any thing about Robert Huggins' character, was Christopher Huggins, witness for the plaintiff, who said, in his cross-examination, "that he had never known R. H. to steal, nor to do such a trick before." There was no proof that Robert Huggins was known to defendant.

"For the law applicable to the case, I referred the jury to the rule adjudged in the case of *Powell vs. Buck*, 4 Strob 427. They found for the plaintiff."

The defendant appealed and now moved this Court for a new trial, on the grounds:

1. Because, the defendant being a *bona fide* purchaser of the timber sued for, in market overt, according to the usage of trade in that commodity, acquired a legal and valid title thereto against the plaintiff.

2. Because, the usage under which the defendant purchased (from the party in possession) was well known throughout the region where plaintiff lived, and to allow him to take advantage of the wrongful act of his agent is against public policy, and operates as a fraud upon the defendant.

3. Because, his Honor should have instructed the jury,

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that plaintiff having employed as his agent, a man of doubtful, if not bad character, who was unknown to defendant, should not be entitled to recover compensation from defendant for his timber—especially when there was no proof of demand from plaintiff's agent, or that he was not responsible for the value of the timber sold by him.

Harlee, for appellant. *Powell vs. Buck*, differs from this case in the proof as to the usage of trade. Here the proof was more explicit and was sufficient. *Patton vs. Magrath*, Dud. 163; *Singleton vs. Hilliard & Brooks*, 1 Strob. 203; 1 Bl. Com. 74; 2 Bl. Com. ch. Title by prescription; *Story on Ag.* § 73, n., 94, 130, 126, 127, 139; *James vs. Wil. & M. Railroad Company*, 9 Rich. 416; *Horn vs. Nichols*, Salk. 289; *Long on Sales*, 421; 15 East, 45; 1 Strob. 7; *Long on Sales*, 169.

Simonton, contra, cited *Parsons vs. Webb*, 8 Green, 38; 1 Esp. 111; *Paley on Ag.* 166; *Story on Ag.* § 126, 443.

The opinion of the Court was delivered by

WARDLAW, J. In the case of *Powell vs. Buck*, 4 Strob. 427, the defendant was made to answer to the true owner for a raft of timber, which he had purchased from a carrier under circumstances very similar to those which exist in this case. But it will be observed that there a verdict had been found for the plaintiff under instructions which submitted to the jury questions of imputed fraud; and we cannot suppose that the case was understood by the Court to settle that, in all cases of sale by a raftsman, there should be accountability from the purchaser to the true owner without consideration of special circumstances, although there is much in the opinion to favor such a supposition. If special circumstances, to be weighed by a jury, may modify the general

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rule, then the case before us must be tried again, for all special circumstances were excluded from view by the application of a rule which was taken to be inflexible.

The general rule of the common law unquestionably is, that a title to personal property cannot be acquired from a person, who has himself no title to it, except only by a *bona fide* sale in market overt. In all cases of sale not in market overt (and we have no market overt in this State,) the rightful owner, having committed no fault, may recover the goods sold, or their value, from an innocent purchaser.

In like manner the general rule is that a special agent can bind his principal only to the extent of the authority conferred by the principal; but in relation to agency this rule is modified by a "principle which prevades all cases of agency, whether it be a general or a special agency, to act. The principal is bound by all acts of his agent within the scope of the authority, which he holds him out to the world to possess, although he may have given him more limited private instructions, unknown to the persons dealing with him; and this is founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and having authority in the matter, shall be bound by it." Story on Agency, § 127.*

This doctrine applies with equal force to protect third persons, where a principal has clothed his agent, general or special, with all the external *indicia* of property, and third persons have dealt with the agent, supposing him to be the sole principal, without any knowledge that the property involved belonged to another person. Story on Agency, § 93, 227, 443.

* This opinion is written under such pressure that its conclusions depend almost entirely on Mr. Story's text and citations—usually a safe dependence.

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Mr. Justice Buller said in *Fitzherbert vs. Mather*, 1 T. R. 16; "It is the common question every day at Guildhall, where one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit?"

Our Court has frequently applied this doctrine in behalf of creditors, who have extended credit upon faith of the ordinary *indicia* of ownership, accompanying personal property held by one to whom the real owner has committed the possession in such way as to enable him to impose upon strangers ignorant of the true title; *Archer vs. McFall*, Rice, 77; *Ford vs. Aiken*, 1 Strob. 90; *Ford vs. Aiken*, 4 Rich. 133; *Burgess vs. Chandler*, 4 Rich. 175. These were all cases of possession acquired by a son-in-law from a father-in-law, but they were instances of the application of the general principles we have mentioned, for in neither of them was there in fact a gift, although the appearance of one had imposed upon creditors. Innocent purchasers are not entitled to less favor, and are not less favored by the law, than creditors.

There is no disposition to trespass upon the domain of Equity Courts by taking cognizance of a plea of purchaser for valuable consideration without notice, and making that plea at law available against a legal title when it would not be so held in Equity;—but we only apply an acknowledged principle, which is so deeply founded in justice as to have become a maxim, and which is indispensable to the security of many ordinary transactions; *Root vs. French*, 13 Wend. 571. "Courts of law," (says Mr. Story in his treatise on Agency, § 91,) "also, as far as they may, in regard to personal property, where no technical formalities are necessary to a transfer, now act upon the same enlightened principles of justice. Thus where a man without objection, suffered his own goods to be sold by an officer at public auction, to satisfy an execution against a third person in whose possession they were at the time, it was held, in favor of the purchaser at the sale, that his conduct might well authorize the

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conclusion that he had assented to the sale, or had ceased to be the owner." *Pickard vs. Sears*, 6 Add. & Ellis, 474. The Court there thought that it should have been left to the jury to say whether the plaintiff had not ceased to be the owner,—Lord Denman saying, "The rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." This looks like bringing only intentional impositions under the rule, but our cases in relation to creditors, before cited, have expressly ruled that it is immaterial whether the deceitful appearance was held out by the true owner designedly or unintentionally. That the creditor or purchaser was actually deceived is not of itself sufficient; there must have been on the part of the true owner, some act or conduct calculated to lead to deception, but that act or conduct may be only negligence and not fraud,—only imprudence and not evil design. The question between two persons entitled to equal favor, of whom one must suffer, is, who gave to the faithless agent that credit, which enabled him to effect an imposition? If the true owner did so, then the fraud or folly of his agent would become his fraud, if he should shift the burden of loss from himself to an innocent purchaser.

Now in the case which is before us, the plaintiff, true owner of the timber, is *prima facie* entitled to recover the value of it from the defendant, who purchased from Huggins the raftsmen; but the plaintiff's right is not so conclusive that it may not be rebutted. If it should appear that the defendant or his agent knew that Huggins was only an agent, then the defendant will be bound to abide the consequences of the agent's having exceeded his authority, unless he can show that the true owner held Huggins out to the world as one having authority to sell the raft. If it should

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appear that neither the defendant nor his agent knew that Huggins was an agent, but that they dealt with him supposing him to be the true owner, then it will be necessary for the defendant to go further, and show some act or conduct of the plaintiff which led to the defendant's loss, as that the plaintiff put Huggins into possession of the raft, with the usual *indicia* of ownership, so as to enable him to hold out appearances which would have misled a prudent purchaser. Whether the possession of such a raft by two white men, who said that they had cut the timber and owned it, was sufficient evidence of ownership, the jury will consider, with reference to evidence that may be given of the usual course of the business of cutting, rafting and selling timber on the Pee Dee.

It will not do to say that, if the jury should regard Huggins as entitled to sell, then no owner of timber can trust it to a carrier without incurring the risk of loss. One obvious answer is, let the owner employ an honest or a responsible carrier; and another is, let him take care to show by some suitable means that the carrier is neither the owner nor an agent to sell.

Nor will it do to imagine cases in which the doctrine, that may protect the purchaser in this case, may be carried to an alarming extent, in derogation of the rights of true owners; as for instance cases of negroes hired for a year, of horses hired from livery stables, and of articles lent. As to negroes mere possession is upon safe grounds of distinction held to be ordinarily much feebler evidence of ownership, than it is of other chattels; (*Maples vs. Maples*, Rice, Eq. 300,) and as to horses and other articles hired or lent, surrounding circumstances will determine between the true owner and an innocent purchaser, which has by any unfairness, or imprudence, brought upon himself loss; and if both are equally free from all fault the ultimate question will be, who gave credit to the actual wrong doer. Even where the third person who did

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the wrong was known to be only an agent it is "a general rule when a commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser will be safe, although the agent may have acted wrongfully, and against his orders or duty, if the purchaser has no knowledge thereof." Story on Agency, § 94, 73, note; *Pickering vs. Bush*, 15 East, 43. Stronger is the case, where the commodity is sent as above, and the person in possession is so held out as to appear the true owner.

Without intending then to indicate any opinion, and really without having formed any, on the questions which as we have said, should have been submitted to the jury, we direct a new trial.

Motion granted.

WHITNER and MUNRO, JJ., concurred.

O'NEALL, J. I dissent. The case of *Powell vs. Buck*, was, I think, properly decided, and hence this case is, as I conceive, decided wrong.

Motion granted.

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THE STATE vs. CHARLES SMITH.

In charging the jury, in reference to a voluntary homicide, effected by a deadly weapon, the Judge defined manslaughter to be, "homicide committed in sudden heat and passion and *on sufficient legal provocation*," and again he said, "It is not every killing in passion that the law mitigates down to manslaughter; it must be passion *justly excited by legal provocation*." The jury found the prisoner guilty of manslaughter, and on appeal, *held*, that the terms used to characterise manslaughter were suitable and proper.

The inadvertent omission by the Judge to say any thing about the prisoner's character, which was proved to be good, and relied upon in the defence, is no ground for a new trial.

Discrepancies between the testimony of witnesses for the State, as given on the trial, and their testimony, as carefully taken in writing by the coroner at the inquest and signed by them, were relied on to discredit the witnesses :—*Held*, to be no ground for a new trial, that the Judge, in adverting to this matter, said to the jury, that "evidence was often loosely taken, and perhaps no very great weight should be given to these discrepancies."

BEFORE MUNRO, J., AT CHARLESTON, FALL TERM, 1856.

Indictment for the murder of Joshua Fowler, on the morning of the 8d September, 1856, at Summerville.

According to the testimony of the several witnesses, (Joseph H. Buckhalter and Frederick J. Fowler, a son of the deceased, being the principal ones) who were examined for the State, it appeared, that on the night of the homicide, the deceased, Joseph H. Buckhalter, Frederick J. Fowler, Smith the prisoner, and some others, were out from about eight o'clock in the evening on a sernading party; that near the railroad depot one Bodow kept a liquor shop, at which place they had called several times during the night, and that they were there again at two o'clock in the morning; the whole

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party were somewhat merry, but none intoxicated; Smith had drank at the expense of others, but none of the party had tasted liquor at his expense; they were about to separate—"the break-up dram" having been already taken—when Buckhalter called on "Uncle Josh" (deceased) "to play one more tune, and call on Smith to treat, as he had not treated once to night;" Smith became angry, but said nothing until deceased having played part of a tune, told him, it was his treat; Smith replied with a vulgar and insulting expression, and immediately walked out of the shop, stopping near the gate, a few feet from the door of the piazza; deceased continued playing for half a minute, and then putting down his violin, rose and followed, saying "Smith did not know who he was addressing;" when deceased reached Smith, he spoke to him, saying, "you do not know who you are addressing; you are speaking to white people; you are not white yourself;" and as he said this, with his left hand he brushed Smith's hat—"made," as the witness expressed it, "a sort of wipe down of it,"—and added, "I would not ask much to give you a licking;" as he uttered these words, Smith, who was left handed, was seen by Buckhalter to strike deceased a blow upon the chest with his left hand; deceased immediately returned the blow, and exclaiming, "Jesus, Joe, the son-of-a-bitch has cut my heart out of me," reeled off some eight or ten paces, and fell dead; it was ascertained that the wound, which killed him, was a stab in the left breast, which reached, it was supposed, his heart; the knife with which it was inflicted was picked up on the spot, and was indentified as Smith's.

The principal witness for the defence was Fuller Smith, a lad seventeen years of age; He testified to a state of facts, tending to show, at least much provocation, if not that the blow was given in self-defence.

The testimony of the principal witnesses for the State as taken in writing by the coroner at the inquest, and signed by

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them, was given in evidence and much relied on as discrediting the testimony of the same witnesses as now given. The coroner testified that the testimony at the inquest was carefully taken down, and read over to the witnesses before they signed it.

Smith's character was also relied on. It was testified that he was "a quiet and peaceable man; rather a coward, and more disposed to run away than fight."

The report of his Honor, the presiding Judge, is as follows :

"The prisoner was indicted for the murder of one Joshua Fowler, at Summerville, on the night of the 2nd, or the morning of the 3rd of September last.

"The prisoner was convicted of manslaughter, and he appeals on the accompanying grounds.

"In reference to the defendant's second ground, I would merely state, that the omission with which I am charged was wholly unintentional, and had it been brought to my notice at the time, I should certainly have submitted it to the jury; although, I can hardly suppose that injustice has resulted to the prisoner from such omission—especially when it is considered, that ample amends had been previously made for any inadvertence of mine in that particular, in the force and eloquence with which this topic was pressed upon the consideration of the jury by both of the prisoner's counsel.

"Accompanying this report, is the testimony taken upon the trial."

A report of his Honor's charge, as taken from a newspaper, was printed, and furnished the Court of Appeals on the argument of the case. That report stated, that his Honor, after saying to the jury, it was their exclusive province to consider the facts, charged them, upon the law, as follows :

"Homicide is of two kinds—murder and manslaughter. Murder is defined to be the killing of a human being with deliberation; to constitute murder, the principal ingredient

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is malice. Manslaughter is defined to be homicide, committed in sudden heat and passion, and on sufficient legal provocation. Express malice is where a purpose is deliberately formed to take the life of any one; implied malice is a deduction of law from circumstances. It may be implied from the weapon—as if, for example, a school master should use an unlawful weapon and death ensue, it would be murder. But, there is no malice in manslaughter; it is a crime, committed in hot blood: for example, where the parties are engaged in mutual combat—inasmuch as it is committed in hot blood, it is manslaughter. It is not every killing in passion that the law mitigates down to manslaughter; it must be passion, justly excited by legal provocation. Where the provocation is slight, and the killing is with a deadly weapon; where the means used are disproportionate to the end of resistance or self-defence, then such killing is murder. Justifiable homicide is where one kills another, either to save his own life, or his person from violence. It is where one is assaulted upon a sudden affray, and there is no other means of escape. It must be shown that the slayer was retreating as far as he could, with the intent to get out of the way.

“If the fatal blow in this case was struck at the gate, and the jury believe the witnesses for the prosecution, then they should find the prisoner guilty of murder. But here they must look to the alleged discrepancies in the testimony of those witnesses, as taken before the Coroner, and as given in Court—the Coroner said he took it down carefully, as spoken, and he read it over to them as it was spoken—but of this matter the jury were the judges. Evidence was often loosely taken, and perhaps no very great weight should be given to these discrepancies.”

The prisoner appealed, and now moved this Court for a new trial, on the grounds:

1. That his Honor erred, it is respectfully submitted, in

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defining manslaughter, in his charge to the jury, to be homicide, committed in sudden heat and passion, and upon sufficient legal provocation.

2. That his Honor erred, it is respectfully submitted, in omitting to lay any stress on, or even to notice, in his charge to the jury, the general good character, and especially the character for peace and good order, of the defendant, which ought always to weigh much in doubtful cases.

3. That the verdict was founded on the evidence of hostile, murderous and perjured witnesses, self-contradicted, and that by their own sworn testimony, carefully taken in writing by the Coroner, and otherwise contradicted and discredited, by other witnesses, and by the discrepancies and incredibilities in their own testimony.

4. That the verdict was against the overwhelming weight of the evidence, and ought to be set aside, *ex debito justitiæ*.

5. That the verdict was, in the foregoing, and in other respects, contrary to law and evidence, and to the plain reason and justice of the case.

T. Y. Simons, Jr., Yeadon, for appellant.

Hayne, Attorney General, contra.

The opinion of the Court was delivered by

WARDLAW, J. This case is important to the prisoner, and every case of homicide is important to the State. Although the appeal appears, upon examination, to bring under review little besides the verdict which the jury has rendered upon the evidence, we will notice, with care befitting the occasion,

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the particulars of misdirection, about which much has been said in the argument. The complaints amount in substance to a criticism upon the Judge's CHARGE, as it was reported in a newspaper, and they undertake to show that one word was not the best that might have been selected, that greater completeness might have been given to certain definitions, that this remark ought to have been introduced, and that one omitted:—not that any thing was said by which the jury could have been misled to the disadvantage of the prisoner.

FIRST. *Legal* provocation is supposed not to be a proper technical expression, as every sufficient provocation must be something illegal. Judge Gaston in the case of the *State vs. Will*, 1 Dev. & Bat. No. Ca. Rep., 168, says—"some causes of passionate excitement are termed 'legal provocations,' while others have been declared not to be 'legal provocations.' This must not be understood to mean that a man has a legal right to be provoked, but only that the law regards certain offensive acts as provocations, while it refuses to consider others as such. The latter, though provocations in common parlance are not provocations in a legal sense, and therefore not comprehended in the legal phrase, *legal provocations*."

This phrase may be found in the text of other accurate writers, as in 1 East's P. C. 238, 242.

In the case before us, the Judge, speaking in reference to a homicide effected by a deadly weapon, so defined voluntary manslaughter, as to require that sudden heat and passion should not only exist, but be excited by "sufficient legal provocation,"—"be justly excited by legal provocation." No doubt was left, that the meaning was to require a provocation of that kind which the law deems necessary to mitigate to manslaughter the guilt of a party, who upon such provocation has slain a human creature by the use of a deadly weapon; and to require, further, that such provocation should be somewhat proportionate to the punishment inflicted, or, as

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it is often expressed, should be reasonably sufficient. There is no doubt that this was a just exposition of the law, and it would not be easy to select a more suitable phrase, to express the required provocation so as to guard against vulgar error than that of "sufficient legal provocation."

In the report which has been laid before us, professing to be a mere summary, taken without the aid of a stenographer, "deliberation" and "sufficient legal provocation" are, respectively made to characterize murder and manslaughter; and using the terms in a strict technical sense, this is correct. But *deliberation* must be understood to mean, not slowness and composure as distinguished from suddenness and excitement, but freedom from the temporary phrenzy, excited by sufficient legal provocation, as distinguished from that phrenzy which the law allows to moderate its rigor in pity to human frailty. A voluntary act, which is without sufficient legal provocation, is deliberate, no matter how sudden or how furious it may be. If, according to the popular acceptance of terms, deliberation should be required to constitute murder, but every exciting provocation should be held of itself sufficient to mitigate a homicide to manslaughter, many of the most wanton and atrocious murders would escape deserved punishment. This prisoner has no right to complain of the definitions as reported.

SECOND. Nothing was said to the jury about character. The ordinary observations would have been made, if the omission had been called to the mind of the Judge, but nothing was said to oppose or weaken what had been urged to the jury on this head by the prisoner's counsel. Character was one of the circumstances found in the evidence bearing upon the main facts of the case. What comments a Judge shall in his summing up make upon facts, must be in a great measure left to his own discretion, when he has properly warned the jury of their province and responsibility. His

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mere omission of a topic, which another would have dwelt on, cannot be complained of, unless it amounts to a misstatement; and even then an opportunity to correct the omission should be afforded by a suggestion from those who being present, think that they suffer from it, unless it appears to be intentional and not inadvertent.

In this case the character of the accused could have been only remotely influential. That he had the reputation of being sober, industrious and ordinarily peaceable, is consistent with his extreme violence on a special occasion, as the sad experience of our Courts too often shows. That he was "rather a coward, more disposed to run than fight," might, according to different views and circumstances, make more or less probable, his unnecessary perpetration of a bloody deed.

THIRD. Complaint is made that the Judge, after bringing to the notice of the jury the discrepancies, between the testimony of the witnesses on the part of the State given in Court, and their depositions taken by the Coroner, and after repeating what the Coroner had testified concerning his manner of taking the depositions, and after leaving the jury to judge of the matter, said that "evidence was often loosely taken, and perhaps no very great weight should be given to these discrepancies."

The general observation, as applicable to the manner in which testimony is often taken and written down by persons who act as Coroners, is lamentably true. The Coroner's office is one which occasionally requires a high degree of intelligence, skill and accuracy, but generally its duties are performed in a most perfunctory manner. Often the report of testimony, which is returned with an inquisition *super visum corporis*, is worse than useless—deficient in the information which it should give, and serving only to perplex witnesses and protract the trial, by the tedious references

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which in examination and argument are usually made to it. Plain men in narrating, generally omit many things which skilful advocates would extract from them by examination and cross-examination; the interruptions occasioned by an attempt on the part of an ordinary writer, to write down every word used by a witness, makes the narrative more bungling and confused; an attempt to condense the testimony without interrupting the witness, gives widely different results from the hands of different writers, according to various abilities and habits of mind and body, even when the writers are practised in the business: when the writer is inexperienced and the witness is ignorant, there is small assurance that the writing read over and acknowledged, contains even the substance of what was deposed.

But in this case it is said that the writing was carefully done by a competent person, and that the discrepancies are not omissions, but contradictions. The remark of the Judge did not then do more than make a doubtful suggestion to the jury, of matter which should enter into their consideration in weighing the effect of these discrepancies. There was no withdrawing from the jury of any thing in the evidence on the subject, and a much more decided expression of the Judge's opinion would have been no interference with the right of the jury to decide the facts submitted to them.

If the Coroner was correct, these discrepancies seem to show that there was some ground for distrusting the two principal witnesses on the part of the State. If they had been confidently relied on, the verdict according to the opinion of the Judge, should have been guilty of murder.

Could it have been less than manslaughter, if they were wholly disbelieved as to every thing in which they were not corroborated by the *evidentia rei*, or other witnesses? The death of the deceased, caused by a knife in the hand of the prisoner, is established beyond reasonable doubt. If then Fuller Smith's account is taken to be, in all respects, correct,

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there was a killing with a deadly weapon upon sufficient legal provocation, but much must be conjectured to make that killing an act of excusable self-defence. How could the prisoner have had reasonable grounds for believing that he stood in such imminent danger of death or of great bodily harm, as to require the use of the knife,—that most dangerous and most treacherous of all instruments—in the dark, and without one cry of fear, or word of warning, when so easily he could have avoided the conflict? But we will not comment on the testimony. The jury have decided that the case was not one of self-defence, and in that opinion we entirely coincide.

The motion is dismissed.

O'NEALL, WITHERS, WHITNER, and MUNRO, JJ., concurred.

Motion dismissed.

CASES AT LAW,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA.

Columbia—May Term, 1857.

JUSTICES PRESENT.*

HON. JOHN B. O'NEALL,
" JOSEPH N. WHITNER,

HON. THOMAS W. GLOVER,
" ROBERT MUNRO.

THE STATE *vs.* JAMES A. PRICE.

A prisoner on trial for murder will not be allowed to withdraw a peremptory challenge in order to challenge for cause, where the prisoner's counsel ascertains from the juror upon his leaving the box, that there was a connection by marriage between the deceased and the juror.

The decision of a circuit Judge directing a jury to be organized for the trial of a capital offence, according to the late rule of Court, approved of.

BEFORE WHITNER, J., AT UNION, SPRING TERM, 1857.

The report of his Honor, the presiding Judge, is as follows :

"This was an indictment for the murder of Joseph Hughes, 24th July, 1853. A mis-trial was had Fall term, 1853, in

* HON. DAVID L. WARDLAW, absent, holding the Circuit Court for Charleston. HON. THOMAS J. WITHERS, absent from indisposition.

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consequence of the illness of a juror, and the defendant escaped from jail shortly before the succeeding term of the Court. He was re-committed in November last, and received his trial at March term for Union district, and was convicted of murder.

"There was conflicting testimony as to the attendant circumstances leading to the homicide, and the grounds of appeal render necessary a report of the evidence. This, I propose to furnish very minutely, though a brief outline may render it more readily intelligible.

"It will be seen, that the case made on the part of the prosecution, established the fact, that the deceased, Hughes, was slain by the prisoner, without circumstances of excuse or mitigation. The evidence relied on by the prisoner, was given by two women, alleged eye-witnesses of the occurrences, the testimony of one given at the trial, and of the other, read from the notes of the presiding Judge, taken at Fall term, 1853, by consent, as she had left the country. These witnesses were assailed, and I presume in the estimation of the jury, discredited. They testified that the deceased committed a violent battery on the prisoner immediately preceding the only blows they declared were inflicted by him, the former striking with a battling stick, such as is used by washerwomen, the latter with a chair. They located the rencontre in the back yard at the house of the prisoner, though the dead body was found in the front yard, with an appearance of having been dragged a short distance from the spot where it had been lying. They gave an account of the early transactions different from that given by witnesses introduced by the State, though none of them professed to have been immediately present when the mortal blows were struck. The parties had drunk freely, and so had some of the witnesses. The day was Sunday, and the fatal occurrences leading to the homicide transpired between sun-set and nine o'clock, at night. The

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deceased was an infirm old man, much the inferior of the prisoner in physical strength.

"In reference to the first ground of appeal, the facts are precisely as follows: Dr. Askew was called and presented in the usual form to the prisoner, and peremptorily challenged. The challenge was noted and the juror was directed to withdraw. As he was walking off, he was called by defendant's counsel to his seat, and during an interview between the juror and counsel, the Clerk was directed to proceed. Counsel asked the Clerk to stop. After a brief interview, the counsel asked to recur to this juror, that he might be permitted to challenge him *for cause*, alleging that he was then informed, for the first time, and by the juror, that *cause* existed. An objection was made on the part of the State, and the objection was sustained. In order, however, that the whole fact should be known, on inquiry it appeared the juror had communicated that the mother of the juror's wife and the wife of the deceased were sisters.

"In reference to the second ground of appeal, it may be said, that the argument was very full as well on the part of the prisoner as on the part of the State, the counsel for the prisoner maintaining that the case made was a killing in self-defence, or at most, but manslaughter.

"The jury was fully instructed by the presiding Judge, as to the law of the case involving the questions of murder, manslaughter, and killing in self-defence, and it is thought, in a way entirely acceptable to prisoner's counsel. The whole testimony was read over from my notes, and the attention of the jury called to the prominent facts, as declared by the witnesses. The jury was carefully guarded against adopting any suggestion, except so far as in their judgment the testimony should warrant. The verdict, the jury was told, should be the result of their own conclusion, and application of the law as expounded to the facts as ascertained by them, irrespective of any opinion expressed or intimated

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from any quarter whatsoever. From the view I had taken of the evidence, I was not favorably impressed as to either branch of the defence set up by the prisoner. I said to the jury distinctly, in reference to the alleged killing in self-defence, that, in my opinion, the facts established, would not warrant such a defence. In reference to the question of manslaughter, I remarked, that whilst I would feel it my duty, in favor of the life of the prisoner, to communicate freely an opinion, if entertained, that the proof made out the defence; yet, that in this case, where there had been such conflicting testimony, and so much depended on the credibility of witnesses, a question so peculiarly for the jury, I preferred to submit this whole branch of the defence to their unbiassed judgment, wholly uninfluenced by any impression made upon my own mind; that the evidence on which the question would be found to turn, was not presented in such a way as to justify any interference on the part of the Court, or to call for an expression of opinion on my part favorable to the prisoner. I believe the jury was fully and solemnly impressed, that with them alone, rested the entire responsibility of deciding the issue.

"In reference to the third ground of appeal, it is proper to say, that when about to proceed with the trial, the counsel for the prisoner inquired if it was the purpose of the Court to organize the jury in conformity with the late Rule of the Court on that subject, and being answered affirmatively, the organization of the jury proceeded."

The defendant appealed, and now moved for a new trial, on the grounds, *inter alia*:

1. Because the Court refused to permit the defendant, after he had peremptorily objected to a juror, to show cause; when, in a moment after, and before the juror had returned to his seat, the prisoner asked to be permitted to show cause

Columbia, May, 1857.

against the juror, having first at the moment after, been informed of the objection.

3. Because his Honor erred in ordering and directing the jury to be drawn according to the manner prescribed in the ninety-seventh Rule of Court.

Herndon, for appellant, cited on 1st ground, 2 Hawk. P. C. 568; 2 Dal. 345; and on 2d ground, Con. of So. Ca. Art. 9, § 6, 1 Stat. 191; Act 1731, 3 Stat. 276; *State vs. Sims*, 2 Bail. 29; *State vs. Crank*, 2 Bail. 66; 2 Speer, 422.

Melton, solicitor, contra, cited, 32 Eng. C. L. R. 761.

The opinion of the Court was delivered by

O'NEALL, J. The prisoner's first ground raises the question, whether, after challenging a juror peremptorily, the challenge allowed, the juror having left the box, and the prisoner's counsel having ascertained from the juror that there was a connection by marriage (not relationship), he could withdraw his peremptory challenge, and challenge for cause?

I answer the question, *he could not!* A peremptory challenge, Hawkins in his 2 Book, 43 chap., 4 §, page 570, tells us, must be "taken by the *prisoner himself, even in such cases wherein he may have counsel.*" This direction, it would be well should be more strictly attended to in practice. This challenge proceeds upon the notion, that the prisoner may upon looking at the juror be unwilling he should try him. When he has announced his rejection, I do not see how he can revoke it, otherwise than that he may be permitted, when his rejection was the result of a sudden mistake, to take him as one of his jury: or when the panel being exhausted, he elects to take one, whom he had previously rejected. *U. S. vs. Porter*, 2 Dall. 345.

State vs. Price.

In *Baldwin's* case, 1 Tread. 289, 3 Brev. 309, it was held, that a juror could not be examined to ascertain *the cause*, why he should not sit. *Here*, the course pursued is a greater violation of legal propriety. For the juror is excluded, and then examined by the prisoner's counsel to ascertain *the supposed relationship*: and then he is to be put back to make a challenge for cause.

If, however, there was any sort of ground to question the ruling below, how can the prisoner now complain? He did not exhaust the panel before he completed the jury of his choice. How can he ask for a new trial, when he has been tried by twelve good and lawful men freely selected by himself? I confess I think this is an end of his ground.

The third ground with my entire concurrence has been decided against the prisoner in *The State vs. Boatwright*. I hope the rule, which conforms to English practice, and is not contrary to our statute law, which does not, at all, conflict with the Constitution, and which corrects an abuse, arising under our former practice, will never more be drawn in question. It has worked well, on every trial since it went into operation. It has prevented and may prevent guilty men from escaping the punishment due to their crimes. But it has never endangered, and never will endanger an innocent man. It preserves jury trials from the contamination of fraud, bribery, and undue influence, and is thus entitled to the support of *honest and just thinking men*, after time has been given to calm down, and reflect.

The motion is dismissed.

WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, May, 1857.

ROBERT B. EXUM *vs.* JONATHAN B. DAVIS.

In assumpsit, on open account, the non-joinder of a joint contractor, who should have been made a defendant, can only be taken advantage of by plea in abatement.

Where one of two joint contractors is sued on an open account, plaintiff's books of account,—defendant not having objected to the non-joinder by plea in abatement,—may be given in evidence, and, although they show a joint liability, plaintiff is entitled, it seems, to recover the whole amount.

A miller's books of account may be given in evidence, to prove an account for meal delivered.

BEFORE GLOVER, J., AT MARION, EXTRA TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

"The action was assumpsit on a miller's account for meal furnished between the 5th of May and 16th of December, 1854. The plaintiff was permitted to prove his account, which amounted to two hundred and forty-eight dollars and ninety-three cents. The meal was charged to Jonathan Davis and William Barnes. One Register first came, and said the defendant had sent him. The meal was sent in defendant's wagon, but by Wm. Barnes' boy, and on plaintiff's requesting that orders should be sent, the defendant said it was not always convenient to send them, (some of which had been sent,) and that he could send without.

"It appeared that in 1854 the defendant and Wm. Barnes were engaged in the distilling of turpentine, the former employing about nine, and the latter about nineteen or twenty, hands, and that all of their hands used the meal. Register was Wm. Barnes' agent, and the defendant conducted his own business and also attended to Barnes' still. In June, 1854, or

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before, the plaintiff asked the defendant for money, who replied that he must wait until Wm. Barnes returned, and offered to give plaintiff a due bill or order, and if he would go down to Georgetown, Barnes would take it up.

"The attention of the jury was called to the fact that the charges were against both defendant and Wm. Barnes, and if they believed that defendant got one-half of the meal, before the orders were sent, or used it in proportion to the number of hands which he employed, they might charge him accordingly; and they were directed to inquire if, from the evidence, he had ordered all the meal after July, and was liable for the whole or for what part of it.

"No motion was made for a non-suit, because of the non-joinder of Wm. Barnes, nor do I remember that it was insisted upon, except as a circumstance showing that the defendant was not liable for the whole amount charged.

"The jury found for the plaintiff two hundred and twelve dollars and forty-five cents."

The defendant appealed, and now moved for a new trial on the grounds:

1. Because the account sued on was charged in plaintiff's book of accounts against William Barnes and Jonathan B. Davis, and Davis being alone sued, the plaintiff had no right in this action to recover against him singly on said account.

2. Because his Honor erred in charging the jury that previous to July, 1854, even if the charges were made against Barnes and Davis, yet plaintiff might in this action recover half the account against defendant to that time, or such part, less than half, as the jury might give him.

3. Because his Honor erred in instructing the jury that though the charges were against Barnes and defendant, yet

Columbia, May, 1857.

after July, 1854, plaintiff could recover against defendant alone the whole amount of account.

4. Because the verdict covers a portion of the account before July, 1854, when there was no proof whatever to fix defendant's liability therefor.

5. Because the plaintiff was not a tradesman, and his books were not legal evidence of his demand.

Harlee, for appellant. On first ground.—The plaintiff's books show the contract joint, though in the bill of particulars the charges were against defendant alone. The books being the only evidence of indebtedness, and showing a joint contract, plaintiff had no right to sue defendant alone. 1 Tidd's Pr., 9; Sand. 216; 1 Chitty's Pl. 27.

Second and third.—There was no proof of any delivery to, or any promise by, defendant, or order by him, until his order in July, 1854. 1 N. and McC., 436; *Ferguson vs. Ford*, MS., 1826; *Lance vs. McKenzie*, 2 Bail. 449; *Brown vs. Kinloch and Phillips*, 2 Sp., 286.

The books of plaintiff are different from a tradesman's or mechanic's. This case is not analogous to *Gordon vs. Arnold*, 1 McC., 517. There a miller's books were admitted to prove quantity of lumber delivered. It was a necessity; but here the books of any planter, for sales of corn or meal, are equally as admissible. *Lance vs. McKenzie*, 2 Bail. 449.

Inglis, contra.

Curia, per O'NEALL, J. The objection in this case that Barnes was a joint contractor with the defendant cannot avail. The non-joinder can only be taken advantage of by plea in abatement. 1 Chitt. Plead. 46.

That the book of account charged it to them jointly was no

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objection to it as matter of evidence. The Judge gave the defendant a rather better result than perhaps in strict law he was entitled to receive. For according to 1 Chitty 46, he might have been charged with the whole account, when the Judge only directed him to be charged with one-half, or his proportion of the meal, to the time he made himself liable for the whole: and then according to it.

There can be no doubt, that a miller's books are evidence; and there can be no distinction between the keeper of a saw mill and a grist mill. *Gordon vs. Arnold*, 1 McC., 517.

The motion is dismissed.

WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

Columbia, May, 1857.

THE STATE *vs.* NEIL CRAWFORD.

It is not necessary to a conviction of bastardy, where the information is given, not by the mother, but by a third party, that it should appear that the child is likely to become a burden to the district.

BEFORE GLOVER, J., AT CHESTERFIELD, SPRING TERM,
1857.

This case was heard in the Court of Appeals upon a brief, which being commended by the Court to the bar for imitation, is here printed in full, and is as follows.

IN THE SESSIONS—AT SPRING TERM, 1857.

Tried before Glover, J.—At Chesterfield.

THE STATE, }
 vs.
NEIL CRAWFORD. }

REPORT.

This was an indictment for bastardy, founded upon a presentment of the Grand Jury at Spring Term, 1855, in the following terms,—“The Grand Jury present Lucy Ann Smothers, for having a bastard child in this District, and not having as yet sworn it to any person.” Lucy Ann Smothers was examined as a witness for the prosecution, and in the course of her testimony said that, “She never would have sworn her child, if she had not been compelled to do it, that she did not want any one to support her child, she could support it herself.” Her mother was also examined for the State. A number of witnesses were introduced for the defendant, with a view to discredit the testimony of Lucy Ann

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Smothers, by contradicting her statements, and proving her character bad. The jury, however, rendered a verdict of "Guilty." The defendant moves in arrest of judgment and for a new trial on the grounds annexed.

THOMAS W. GLOVER.

IN ARREST OF JUDGMENT.

First.—That it appears from the record, that Lucy Ann Smothers, the mother of the bastard, did not voluntarily give information against the defendant, but was compelled to disclose the paternity of her child, on information of third parties, which information does not state that "her child is likely to become a burden to the District."

Second.—That bastardy is not, in the regard of the law, a criminal offence, and proceedings against the putative father, at the instance of persons, other than the mother, are authorized only in cases where the bastard "is likely to become a burden to the District"—that in order to the inception of such proceedings, information, not simply of the birth of the bastard, but expressly, that "it is likely to become a burden to the District," is an indispensable pre-requisite. And it appears from the record in this case, that the information, in which this indictment originated, came not from the mother, but from third persons, and does not contain any such allegation.

FOR A NEW TRIAL.

That it was distinctly proved by the witness for the prosecution that the child is not likely to become a burden to the District—that the mother is both able and willing to support it—the allegation of the indictment in this behalf,

Columbia, May, 1857.

was by this evidence, disproved, and the verdict should have been for the defendant.

J. A. & W. C. INGLIS, *Atty's. for Defendant.*

Extract from the presentment of the Grand Jury, at Spring Term, 1855.

"The Grand Jury present Lucy Ann Smothers for having a bastard child in this District, and not as yet having sworn it to any person."

BENCH WARRANT.

State of South Carolina, }
Chesterfield District. }

By their Honors, the Circuit Judges of the said Court.

TO ALL AND SINGULAR THE SHERIFFS AND CONSTABLES
 OF THE SAID STATE:—GREETING:

Whereas, at a Court of General Sessions, held at Chesterfield Court House, on the first Monday in —, in the year of our Lord one thousand eight hundred and fifty-five, the Grand Jury presented Lucy Ann Smothers for having a bastard child and not having Sworn it to any person; whereupon the Court ordered that a Bench Warrant issue to bind over the said Lucy Ann Smothers, to appear at the next Term of this Court to give testimony as to who is the father of the said bastard child. These are therefore, in the name and by the authority of the said State, to command you and each of you forthwith, to take the body of the said Lucy Ann Smothers, and bring her before the Court now sitting together with this warrant, and if the said Court shall be adjourned, that you bring her before one of the Associate

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Judges of the said State, or a Justice of the Quorum or of the Peace, to find sufficient securities for her personal appearance at the next General Sessions, to be holden for Chesterfield District, at Chesterfield Court House on the first Monday in October next, (or otherwise to commit her to the common gaol of said District,) to do and receive what the said Court, shall then and there consider of her in this behalf, and not to depart the said Court without leave thereof. Herein fail not, as you shall answer the contrary at your peril.

[L. s.] *Witness*, J. C. Craig, Esquire, Clerk of the Court of Common Pleas, at Chesterfield Court House, the twelfth day of March, in the year of our Lord one thousand eight hundred and fifty-five and in the seventy-ninth year of the Sovereignty and Independence, of the United States of America.

McIVER, *Solicitor*.

JAS. C. CRAIG, *Clerk*.

EXAMINATION OF LUCY ANN SMOTHERS.

State of South Carolina, }
Chesterfield District. }

The Examination of Lucy Ann Smothers of South Carolina, in the District aforesaid, single woman, taken on oath before me, Wm. B. Hancock, Magistrate, this 14th day of May 1855, who saith that on the 28th day of February, 1852, at the House of Moses Smothers in the District aforesaid, she the said Lucy Ann Smothers was delivered of a female bastard child, with blue eyes and dark hair, and that Neil Crawford of the District and State aforesaid, did get her with child of the said bastard child. Taken and signed the year and day above written, before me.

WM. B. HANCOCK,

Magistrate.

her
 LUCY ANN \bowtie SMOTHERS.
 mark.

Columbia, May, 1857.

TO ANY LAWFUL OFFICER.

*State of South Carolina, }
Chesterfield District. }*

By Wm. B. Hancock, Magistrate in and for the said District.

Whereas Lucy Ann Smothers, single woman, of the State and District aforesaid, hath by her Examination, taken in writing, upon oath, before me, declared that on the 28th day of February 1852 past, she was delivered of a bastard child, and charged Neil Crawford of the said District, with having gotten her with child of the said bastard child. I do therefore, hereby command you forthwith to apprehend the said Neil Crawford and bring him before me or some other Magistrate of said District, to be dealt with according to law.

Given under my hand and seal, this the 14th day of May 1855.

WM. B. HANCOCK. [L. s.]

INDICTMENT.

*The State of South Carolina, } ss.
Chesterfield District. }*

At a Court of Sessions begun to be holden in and for the District of Chesterfield, in the State of South Carolina, at Chesterfield Court House, in the District and State aforesaid, on the first Monday in October, in the year of our Lord one thousand eight hundred and fifty-five. The jurors of and for the District of Chesterfield aforesaid, in the State of South Carolina aforesaid, that is to say :

Upon their oaths present that Lucy Ann Smothers a free white single woman of Chesterfield District, in the State aforesaid, on the twenty-eighth day of February, in the year of our Lord one thousand eight hundred and fifty-two, at

State vs. Crawford.

Chesterfield Court House, in the District and State aforesaid, was delivered of a female child, which by the laws of this State, is a bastard, and that the said child is likely to become a burden to the District aforesaid. And the jurors aforesaid, upon their oaths aforesaid, do further present, that one Neil Crawford is the father of the said child, and has refused to enter into recognizance, with two good and sufficient securities, according to law, for and towards the maintenance of the said child, against the form of the Act of the General Assembly of the said State, in such case made and provided, and against the peace and dignity of the same State aforesaid.

H. McIVER, *Solicitor E. C.*

POINTS MADE AND AUTHORITIES.

I. The production of a bastard is not regarded by our present law, as a public wrong in either party, the whole purpose being to protect the public against the expense of its support. It is a part of our Poor Law System.

See *A. A.* 1839. 11 *Statutes* 16, *Sec.* 12. *A. A.* 1846, *Ib.* 436. *A. A.* 1795. 5 *Statutes* 270—and compare with these, the Old Act, *A. A.* 1703. 2 *Statutes*, 224. *State vs. Darby*, 7 *Rich.* 362—and cases therein cited to be commented on. Also certain terms used in the Act of 1839 and 1847.

II. Where the information, upon which proceedings in bastardy are founded, is given, not by the mother, but by a third person,—such information must allege that the “child is likely to become a burden to the District.” Without this allegation there is no authority in the law to take the first step in such proceedings.

The Acts of 1839 and 1847 contain our whole existing legislation on the subject.

See *The State vs. Derrick*, 1 *McMul.* 338, that the Act of 1795 is repealed. The proceeding against the putative father,

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is the creature of Statute Law. See 1 *Blackst. Com.* [458.] *Ib.* [65.]

III. The authority of the Statute should be strictly pursued.

See *Comm's. of the Poor vs. Gains*, 1 *Tread. Cons. Rep.* 459. *The State vs. Clark*, 2 *Brev. R.* 386. *The State vs. Clements*, 1 *Spears R.* 48. *The State vs. Foster*, 3 *McC.* 441. *The State vs. O'Bannon*, 1 *Bail.* 144.

IV. The *indictment*, here, does allege that the "child is likely to become a burden to the District,"—but the *information* upon which the proceeding is founded, does not. If the objection to the conviction is a valid one—may judgment be arrested therefor?

See *Waterman's Archbold's Crim. Pl. and Pr.*, p. 178—31, note (2.) *McKay & Wilson ads. The State, MSS. Dec.* 1813.

V. If the objection cannot be taken in this form, how else can it be made available? Not by motion to quash the indictment.

For what cause only such motion will lie, See *Waterman's Archbold's Crim. Pl. and Pr.* 102, *text and notes.*

VI. There was in this case positive disproof of the allegation, that the "child was likely to become a burden to the District,"—and therefore, the only ground upon which the law, by its own choice, has any claims against the putative father, upon the motion of a stranger, failed. The verdict should have been "*Not Guilty.*"

The State vs. McDonald, 2 *McCord* 298, commented on.

McIver, Solicitor, for the State.

Per Curiam. In this case we have been struck with the

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perfectness of the brief both in matter and manner, and we take pleasure in commending it to the bar for imitation.

But however much we are pleased with the brief, we are still unable to give any relief to the defendant. The case of the *State vs. McDonald*, 2 McC. 299, decides the point on which the appeal rests the case: it has been uniformly followed since 1822.

We cannot therefore, (if we doubted, which we do not,) do otherwise than decide according to it.

The motion is dismissed.

O'NEALL, WHITNER, GLOVER and MUNRO, JJ., concurring.

Motion dismissed.

Columbia, May, 1857.

W. H. ELLISON *vs.* H. K. AIKEN.

In trespass *quare clausum fregit* defendant justified because of a "private path," setting forth no *termini*, and plaintiff demurred generally: *Held*, that if the plea was defective because the *termini* were not given, such defect was matter of form, and the demurrer should have been special. In a plea of justification to a civil action, the *termini* of a "private path," which in this State is a public way, need not be given. After judgment overruling a general demurrer, leave to plead over will not be given.

BEFORE WHITNER, J., AT FAIRFIELD, SPRING TERM,
1857.

The plaintiff declared in trespass *quare clausum fregit*.

The defendant pleaded the general issue, justification by reason of a "*private path*," and justification by reason of a private way.

The second plea above referred to, sets forth the private path thus, "because he says, that before, &c., there was and of right ought to have been a certain private path into, through, over and along the said close in which, &c., for all persons to go, return, pass and repass, on foot and with horses, mules, cattle, carriages, carts and wagons, at all times, at their free will and pleasure. Wherefore the said defendant having occasion to use the same private path, when, &c., with, &c., went, passed, &c., &c."

To this plea, the plaintiff demurred generally, on the ground that the plea *did not set forth any termini*.

His Honor overruled the demurrer.

The plaintiff appealed on the ground:

That his Honor erred in holding that a plea, setting forth

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a "private path" as a justification for a trespass, is good, when it does not set forth *any termini*.

Rion, for appellant, now moved for leave to withdraw the demurrer, and reply to defendant's second plea. He submitted that the Courts in this State, distinguish between the case of a *Plaintiff*, and a *Defendant* demurring,—as allowing defendant to plead over would always operate a delay to plaintiff. *Moore vs. Burbage*, 2 McM. 169; *Aaron, admr. vs. Harley*, 6 Rich. 26. Even the defendant is allowed to plead over in some cases, upon terms of paying costs. *Exr's. of McCrady* ads. *Brisbane*, 1 N. & McC. 108. The motion is properly made according to what is indicated in *Price, Ex'r. vs. Price*, 1 McM. 291, and in *Aaron, adm's vs. Harley*; and may properly be granted according to *Exr's. of McCrady* ads. *Brisbane*; *Ayres vs. Wilson*, Douglass, 385; 2 Wils. 173; 1 Moore, 61.

Failing in this motion, then he moved for a reversal of the decision below. There can be no question, but that, by the rules of pleading in England, the *termini* of a private way must be set out; of a public way, not. 3 Chitty Pl. 1119 note(d). A "private path" is the creature of South Carolina legislation, partaking of the nature both of a public, and a private way. Evans' Road Law, sec. 1 to 9, inclusive. In reference to the mode and character of their terminations, or *termini*, there is no distinction between a "private path" and a private way. *Id.* According to the general rules and theory of pleading, and according to the *reason* of the English rule of pleading ways, (public and private,) the *termini* of a "private path" should be set forth in pleading. 2 Saunders on P. & E. 919; Story's Pleadings, 663.

Boylston, contra. It is not necessary to set forth the *termini* in pleading a public way. 3 Chitty Pl. 1116, note (w). A "private path" is a public way. *State vs. Pettus*, 7 Rich.

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The reason of the distinction may be found set forth in the opinion of Wilson, J., in the leading case of *Rouse vs. Barden*, 1 H. Black. R. 355. In any point of view, the objection is merely one of *form*, and, if valid, was only ground for special demurrer.

After general demurrer, joinder, argument and judgment thereon, the Court has no power to grant leave to amend. *Moore vs. Burbage*, 2 McMull. 169; *Bagley vs. Johnston*, 4 Rich.

The opinion of the Court was delivered by

O'NEALL, J. The plaintiff's ground of appeal as set down in the report cannot avail him. For he could not under his general demurrer draw in question the point which he wished, to wit, that the plea did not state the *termini*. For his demurrer admitted the character of the road, a *private path*, which is a public way, and along which the defendant had the right to pass and remove all obstructions.

If the *termini* ought to have been stated, it was not matter of substance but was merely of form, and was the subject of special demurrer. A general demurrer does not raise such questions. It merely questions whether the plea in substance is good. But it is very clear in a plea to a civil action, it is not necessary to set out the *termini* of a public way. This the plaintiff concedes: but now insists, that he ought to be allowed to withdraw his demurrer and reply. But this cannot be done. The judgment has been pronounced against him. The Court can merely say whether it is right! The case of *McFarlan vs. Dean*, Cheves., 64, pointed out the distinction between the judgments on special and general demurrer. In the former the judgment was *respondet ouster*, or to amend on payment of costs; in the latter, that it was final. The case of *Moore vs. Burbage*, 2 McMull. 169, recognised

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the distinction and solemnly settled, that the judgment on general demurrer was final.

It is so here, and the plaintiff has been caught in his own trap. From the statements made at the bar, we are glad that it will work no injury to the plaintiff beyond the payment of costs, which is perhaps not an inappropriate penalty upon those, who unadvisedly resort to technical precision to cut off an adversary's rights.

The motion is dismissed.

WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

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THE STATE vs. ANDREW POWELL.

An indictment for peddling, which simply charged, "that A. P. on, &c., at, &c., did sell and expose to sale divers goods, wares, and merchandise, the said A. P. then and there being a pedler, and not having obtained a lawful license," &c. :—*Held* bad, and judgment thereon arrested.

BEFORE WHITNER, J., AT CHESTER, SPRING TERM, 1857.

The defendant was convicted of peddling upon an indictment which charged, as follows:

"That Andrew Powell, on the first day of May, in the year of our Lord, one thousand eight hundred and fifty-six at Chester Court house in the district and State aforesaid, did sell and expose to sale divers goods, wares, and merchandise, the said Andrew Powell then and there being a pedler, and not having obtained a lawful license for that purpose, according to the provisions of the Act of the General Assembly of this State, in such case made and provided, against the form of the statute in such case made and provided and against the peace and dignity of the same State aforesaid."

He appealed, on the grounds, *inter alia*.

1. Because the indictment was defective in neither specifying any person to whom the goods were sold or offered for sale, nor setting forth any other identifying circumstance.

Gadberry, Rion, for appellant, cited, *State vs. Steedman*, 8 Rich. 312; Arch. Crim. Pl. 39; 3 Green. Ev. § 10; *State vs. Foster*, 3 McC., 444; *State vs. Schroder*, Riley, L. C., 70; *State vs. Anderson*, 3 Rich. 174.

Melton, Solicitor, contra.

State vs. Powell.

The opinion of the Court was delivered by

WHITNER, J. Proper legal tests applied to this indictment reveal incontestibly that it is defective in form. It alleges that the defendant "on the first day of May, in the year of our Lord, one thousand eight hundred and fifty-six, at Chester Court house, in the district and State aforesaid, did sell and expose to sale divers goods, wares, and merchandise, the said A. P. then and there being a pedler, and not having obtained a lawful license for that purpose," &c. In all criminal proceedings the party charged should not be led blindfold to the altar. He should know the crime he is called to answer, and it should be so definitely charged that he may know how to shape his defence. When once tried his acquittal or conviction should ensure his subsequent protection against a second proceeding for the same offence. Certainty is required, and this includes as well the matter charged as the manner of charging it. A sale proved at any time anterior to the bill found, and within six months preceding the warrant, at any point in the district of Chester, of any article of merchandise, and to any person, would sustain the allegation in this indictment.

The offence of peddling is very analogous to the offence of retailing, and the present indictment is in exact analogy to a form of indictment examined by the Court in *State vs. Steedman*, 8 Rich. 312.

If the conviction of Steedman on the indictment there preferred against him, could not be sustained, we are all of opinion that the objection is equally fatal in this case. I may be excused from any further vindication of the judgment I am to announce, than may be found in the case referred to. The distinguishing circumstances that would serve to indicate the specific offence intended to be relied on, were equally called for and equally attainable; and I may add as readily set forth in the pleading in the one case as the other.

There might be references to books on Criminal Pleading, as well as other adjudged cases, for they have been examined

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and sustain the ruling now adopted, but it is not thought necessary.

Neither is it necessary to consider the other grounds of appeal. If the present prosecuting officer shall think proper to pursue this defendant any further, the case will be heard and adjudged upon the evidence adduced.

The proceeding in its present form can lead to no result, and though no motion has been formally made in arrest of judgment, such is manifestly the proper order.

It is therefore ordered that the judgment in this case be arrested.

O'NEALL, GLOVER, and MUNRO, JJ., concurred.

Judgment arrested.

Barnes, Bateman & Budderow vs. Bell.

BARNES, BATEMAN & BUDDEROW vs. JAMES M. BELL.

The sitting of the Court for Williamsburg, was altered by Act of December, 1856, from the third, to the second, Monday after the fourth Monday in March. : *Held*, that a writ returnable to the third Monday after fourth Monday in March, and lodged and served before the passage of the Act, was valid, although the Act contained no provision making valid such writs.

**BEFORE GLOVER, J., AT WILLIAMSBURG, SPRING TERM,
1857.**

The report of his Honor, the presiding Judge, is as follows:

"The plaintiff's writ in this case was lodged on the 29th day of November, 1856. Writ served and the defendant arrested on the 13th day of December, 1856. The return term was the third Monday after the fourth Monday in March next thereafter.

"The Court sat at Kingstree on the second after the fourth Monday in March. The notice to appear on the writ was, that the defendant should appear on the third Monday after the fourth Monday in March.

"The writ was issued and served before the passing of the late Judiciary Act, altering the sitting of the Court for Williamsburg District from the third Monday after the fourth Monday in March and October, to the second Monday after the fourth in March and October.

"The defendant moved to set aside the service of the writ, which motion I granted."

The plaintiff appealed, and now moved this Court, to reverse the order of his Honor, on the grounds:

1. Because the writ was good at the time of the entry and

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service thereof, and was returnable to the proper term of the Court as then fixed by law, and the subsequent Act of the Legislature, altering the time of the sitting of the Court, neither invalidated the writ or rendered the service illegal.

2. Because it is submitted that the said Act of 1856, did not make void any process previously issued and returnable to the proper term, but that by a fair and legal construction thereof, process which had been already issued was properly returnable to, and answerable at, the term as fixed by the Act.

3. Because the service should have been held good at least to the next term of the Court, as if it had been served after the return day of the Spring Term of 1857, it would have been good to the next.

Harlee, for appellant. The Act of 1856 did not expressly repeal any other statute, or any part of a statute, except as to the time of holding the Courts as therein mentioned. It did not repeal the law making the service of process good—existing at the passing of the Act of 1856. 1 Bl. Com. 89.

Implied repeals are not favored by the law. Vin. Abr. statutes (E. b.) 132. Broom's Legal Maxims, Law Lib. 12.

The Act of 1856, should not have a retrospective operation without express words to that effect. Bac. Abr. 7 Ed. Title Statutes, p. 639; *Little vs. Holmes*, 4 Term, Rep. 660; 2 Darr. on Stat. 680, 681.

When the law is altered by Statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties in the suit, unless the Legislature express a clear intention to vary the relation of the litigant parties to each other. *Hitchcock vs. Way*, 6 A. & E. 943; *Padden vs. Bartlett*, 3 A. & E. 895.

The Act of 1856 is remedial, and should be construed to
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meet the remedy in view—and should be liberally construed. 2 Dwarr. on Stat. 689-90.

The intention of the Legislature should be looked to in the construction of statutes. Id. 685; 9 B. & C. 752. _____

Dargan & Porter, contra.

The opinion of the Court was delivered by

WHITNER, J. Embarrassing questions have arisen under the recent Act "to alter and amend the Judiciary System of the State," among which is the one here presented.

The Legislature in changing the time for holding certain Courts in the Eastern Circuit, failed to provide, in express terms, for that class of cases and business then *in transitu*, an omission not to be found I think in any preceding legislation of like kind. Here we have a writ issued and served, notifying the party to appear on a day named, to wit: the day fixed by law for holding the Court at Williamsburg, when it turns out by Act of the Legislature, the day for holding that Court is changed and to an earlier day, without any accompanying provision making valid such writs and service as for the day substituted. In the case before us we are admonished that the validity of the service may involve much more than a mere question as to time, the party defendant being held to bail, perhaps transient, and therefore, perhaps, putting in jeopardy the plaintiffs' demand. The difficulty of reaching by implication what was the true purpose of the Legislature is not a little increased by the fact, that in another section of the same Act, provision is made for writs and process returnable in another district, in a different circuit, and where a like change is made in the term.

It is not without hesitation this Court has determined to

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reverse the order on Circuit which set aside the service of the writ in question.

In this effort to reach by judicial construction what alone could be regarded as the object, we hope to escape the imputation of invading the province of the Legislature. No department would hail with greater delight legislative enactments so plainly written out "that the wayfaring man though a fool need not err therein."

In all constructions of statutes, the intention of the Legislature is justly regarded as the starting point, and to this end many rules have been established to aid and guide the discretion of Courts. When the meaning is satisfactorily ascertained, of course the duty of the Court is to carry it out, unless restrained by the Constitution or some great principle, universally conceded, underlying or over-riding the Act itself. The cause of making the statute is often a legitimate mean to limit or enlarge its effect. The sole purpose in the matter now before us was to substitute one week for another, as to the Court "*hereafter to be held*" for Williamsburg District. We may safely assume that no other change was made in the existing law, than such as this change plainly and necessarily carried with it.

When this writ was issued and served, no doubt is entertained it was in conformity with law—the service was good—was it avoided by Act of Assembly, 1856? Not in terms, nor can it be imagined such was the purpose of the Legislature.

Statutes should be construed so as to operate *in futuro*, unless a retro-active effect be clearly intended. It is a general rule that no statute shall be construed to have a retrospective operation without express words to that effect. 7 Bac. Abr. Statute, c. Nor does the law favor a repeal by implication, it never being allowed unless the repugnancy be plain. 2 B. & A. 149; 15 East, 372. But these are familiar principles

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that call for no authorities to sustain them—the question is do they reach the case.

When this action was commenced rights attached, and it is clear upon principle, that the relation of litigant parties should not be varied without some clearly expressed purpose. A remedy may be lost by the bar of the Statute, which would be otherwise avoided. Recognizances entered into as well as bail bonds may share an indiscriminate fate. Judgments and decrees, founded on what is thus ascertained to be an insufficient service, all follow in the train to the upturning of much now regarded as settled.

This is not the case of an inchoate writ, lodged before the Act, and served after its ratification. It had performed its office, and the party was properly notified to attend on the day named, which was then the proper day.

If the Court had been abolished, doubtless the writ must have fallen, in the silence of the Act to provide. But instead, when the party is thus *properly* called to attend at the next regular term, the Legislature steps in and informs him, by public Act, of which he is bound to take notice, that the term of the Court has been assigned to another day. The Act well advertises those having business properly appertaining to the next term at the time of its ratification, that they are required and expected to attend on the new day assigned. Hence cases on the docket at the previous term, though adjourned over to one day, could be properly taken up and disposed of on the day substituted. Process issued and served were doubtless found on the docket, and decrees rendered by the Court. Upon the same principle writs and process issued after the Act, must conform to the new requirement, even although the very day after the ratification, all being presumed to know the law. Process issued before and served after would present a more complicated question than the one before the Court. As to such it would have been less clear that the party suing out the writ was without default, or the

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party sued bound to appear at a different day from that he was thus called on to appear. To avoid these vexed questions it was manifestly proper on the part of the Circuit Judge to decline a call of jurors. Independently of other obstacles presented as to venires not legalized by the Act, it would have been found beyond all question that some had been served before and many after the passage of the Act, and every thing dependent thereon would have been involved in interminable confusion.

The motion to reverse the order made on Circuit setting aside the service of this writ, is granted.

O'NEALL and MUNRO, JJ., concurred.

GLOVER, J., dissented.

Motion granted.

Kyle vs. Laurens Railroad Co.

JOHN KYLE vs. THE LAURENS RAILROAD COMPANY.

TEAGUE & MARTIN vs. THE SAME.

T. A. & J. HUDGENS vs. THE SAME.

The Laurens Railroad Company gave receipts for cotton "to be delivered on presentation of this receipt at Charleston." The cotton reached the *terminus* of the Laurens Railroad in safety, and, there, without bulk being broken, was delivered in the same cars to the Greenville and Columbia Railroad to be carried on. It was afterwards lost:—*Held*, that the Laurens Railroad Company were liable—their undertaking being special, to carry to Charleston.

Where cotton is lost by a common carrier, interest upon its value may be assessed by the jury as part of the damages, in an action against the carrier for the loss.

In estimating the damages in an action against a carrier for the loss of cotton which he undertook to deliver to plaintiffs' factors in Charleston, the amount of factor's commissions upon the value should not be allowed the defendant, in abatement.

BEFORE O'NEALL, J., AT LAURENS, SPRING TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

"In these cases, the undertaking of the defendant was, that the cotton shipped was 'to be delivered on presentation of this receipt at Charleston.'^(a)

(a) The receipts were all alike. The following is a copy of one of them.

Laurens Railroad, April 18th, 1855.

Received of John Kyle, nine (9) bales of cotton, marked as per margin, and shipped this day, to Messrs. E. H. Rogers & Co., to be delivered on presentation of this receipt at Charleston—all in bad order.

JOHN W. EPPES, Agent L. R. R.

Marks.—(Pruth) 4 in Dundee bagging.

Columbia, May, 1857.

"Portions of the shipment, in each case, was not delivered at Charleston.

"An admission was read that Scott and Knox, two witnesses for the defendant, would prove, that the cotton was delivered to the Greenville and Columbia Railroad Company, at the Newberry Depot, by its arrival there; the transfer of the freight list by the agent of the Laurens Railroad to the agent of the Greenville and Columbia Railroad Company, copied in their books; that when the Greenville and Columbia Railroad Company gives a receipt for cotton destined for Charleston, its place of destination is mentioned in the receipt, as information or direction to the other Company, where to carry the cotton.

"Mr. Eppes, the agent of the Laurens Railroad at its head, and who signed the receipts, said, that the freights of the Laurens Railroad, Greenville and Columbia Railroad, and the South Carolina Railroad were collected in Charleston on the delivery of the cotton *there*; each Company, of course, had its respective freight.

"The cars from Laurens did not break bulk at Newberry—the shipping was transferred to the Greenville and Columbia Railroad—the cars went on over the Greenville and Columbia Railroad, and the South Carolina Railroad to Charleston.

"I was of the opinion, and so stated to the jury, that the defendant was not discharged by the delivery of the cotton in the manner proved, to the Greenville and Columbia Railroad. That its (the Laurens Railroad) undertaking was to deliver to the factors at Charleston, on the presentation of the respective receipts, and that the consideration of freight on the Laurens Railroad was enough to prevent the contract from being considered *nudum pactum*.

"I directed the jury, in each case, to deduct the entire freight of the Laurens Railroad, the Greenville and Columbia

Kyle vs. Laurens Railroad Co.

Railroad, and the South Carolina Railroad, two dollars and twenty-five cents, per bale, from the aggregate of the value of the cotton in Charleston, which was done. The commissions on sales of the cotton not delivered, and which, therefore, was never sold, I thought could not be allowed.

"Interest, *eo nomine*, was not allowed; but the jury were told, as cotton was a cash article at the place of delivery—Charleston—they might compute, and add it to the value of the cotton, from the time notice of the loss was given to, and demand of payment was made from, the defendant, who stood in the respect of such a loss as an insurer to the plaintiffs. This was also done by the jury."

The defendants appealed, and now moved for a new trial on the grounds:

1. Because the cotton sued for in these cases was delivered by the defendants to the Greenville and Columbia Railroad Company at Newberry, the *terminus* of the defendants' Road; and their responsibility, for the transportation of the said cotton, then and there ended.

2. Because by the usage of trade, the plaintiffs well knew that the defendants only undertook to carry their cotton to the *terminus* of defendants' Road; and that was the plain meaning and effect of the receipts they gave for the cotton in question.

3. Because if there was any contract on the part of the defendants to carry the cotton further than Newberry, it was without consideration, and void.

4. Because the Court erred in overruling the aforesaid grounds of objection to the plaintiffs' recovery, and in further holding that the plaintiffs were entitled to recover interest,

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and that the expense of commissions in Charleston should not be deducted from the Charleston prices of the cotton.

Sullivan, for appellants.

Simpson, contra.

The opinion of the Court was delivered by

O'NEALL, J. The three first grounds really make the same question, was the defendant liable for the cotton lost, after it reached the Greenville and Columbia Railroad, and before it reached its destination, Charleston? That the Laurens Railroad Company was liable, is, I think, plain from the receipts, whereby it plainly undertook for the delivery of the cotton in Charleston. The cases were in this respect, like the case of *Lipford vs. The Charlotte and South Carolina Railroad Company*, 7 Rich. 409. In that case the Company undertook for the delivery of the cotton in Charleston; and was only saved from liability for a loss, arising from the delay in reaching Charleston, by showing, that the South Carolina Railroad was broken up by a freshet, the act of God.

The case of *Muschamp vs. The Lancaster & Preston Junction Railway Company*, 2 Railway Cases, 607, states, I think, the true rule. There a box was delivered to the Company, directed to a place beyond the *terminus* of the Company's railway; and it was held, by Rolfe, Baron, to be liable for a loss, although the box reached Preston, the *terminus*, and there another took it up to transport it to its destination.

The rule was laid down in that case, by Rolfe, that where a carrier takes a parcel directed to a particular place, and does not by particular agreement limit his responsibility to a *part*, it is *prima facie* evidence of an undertaking to carry to the place, though beyond the limits of his trade, as a carrier; and therefore, that he is liable for a loss occurring even beyond his limit. This ruling was approved on appeal by Lord Abinger, C. B., Gurney and Rolfe, B's.

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The same principle is recognised by the cases cited by the defendant, in the brief. Indeed, the Supreme Court of New York, by Nelson, C. J., in the case of *St. John and Tousey vs. Van Santvoord and others*, 25 Wend. 660, held, that the carrier was liable for a box directed to J. Petrie, Little Falls, Herkimer, and which the defendants received to be transported, on their tow boats on the Hudson, which only ran to Albany, and the box reached Albany safely, but was lost beyond. The Chief Justice said, perhaps a usage of trade might limit their responsibility. The case was carried to the Court of Errors, and it was there held that it was shown, that the usage of trade was to deliver at Albany to the Canal line to transport to the place of destination, and this limited the liability of the defendants to their *terminus*.

The same ruling is repeated, in the *Farmers' and Mechanics' Bank vs. The Champlain Transportation Company*, 18 Vermont, 140. It would be enough to say, concede all which those cases ruled, and still the defendant cannot be helped, for no usage of trade was proved, that the Laurens Railroad Company should deliver to the G. & C. R. R. Co., at Newberry. It was true, the freight list was there turned over, but the cotton went on in the Laurens Railroad cars without bulk being broken. This looked more like the G. & C. R. R. Co., stood in the character of employee to the Laurens Railroad Company, than as liable to the consignor. But in all the cases decided in New York, Vermont, and Connecticut, there was a mere direction of the parcel to a point beyond the carrier's trade. *Here* the carrier especially undertakes, on the presentation of the receipts given for the cotton, that it should be delivered in Charleston. This it seems to me ends all pretence, which might arise under an implied undertaking from a mere direction. As to the notion of *nudum pactum*, the report sufficiently answers it.

Two questions arise out of the fourth ground,—1st was the Company liable for interest on the nett value of the cotton?

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2nd was the Company entitled to deduct commissions on the value of the cotton as if sold?

Interest was, I think, properly allowed. The cotton lost was a cash article, at the place of delivery; its value was estimated on a cash sale, so that the plaintiffs' loss was respectively, as of so much cash. Hence, interest must be charged against the carrier by whom the loss was occasioned. I regard a carrier, in the light of an insurer against every thing, except the act of God and the enemies of the country. In 2 Phillips on Ins. 750-1, we are told the practice is to allow interest against the insurers on the loss from the time of abandonment: or perhaps more properly speaking from notice of the abandonment, and demand of payment, or after the expiration limited by the policy for payment to be made. The interest here was computed from the time of demand of payment.

The answer to the second question cannot, I think, be well doubted after it is properly considered. The carrier in ordinary cases has no right to commissions. If, as in the case of *Bridge vs. Austin*, 4 Mass. Rep., 115, he undertook to transport and sell, and for so doing, then, he was to have five per cent. commissions, it may well be in the case of a loss, he would have the right to deduct the commissions. For they were a part of his compensation for his service touching the article lost. But in these cases, the carrier had nothing to do, but to deliver in Charleston. If a factor might *there* have sold, it was a matter in which the Laurens Railroad Company had no interest whatever.

To illustrate the matter still further, suppose the cotton had reached the Charleston depot, and the carrier had refused to deliver, and trover had been bought, what would have been the plaintiffs' damages? The value of the article, deducting the freight, and adding interest on the nett value. In such a case, commissions could not have been talked about. How in any case can any deduction be made for that, which was

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to be subsequent to the carrier's discharge of liability, by delivering the parcel? The authorities are, I think, clear against such allowance. Sedgewick on Damages, chap. 13, p. 369, tells us, that the rule whereby the damages are fixed, is a rule of law. At 370-1, he tells us, the rule, as to carriers is, the value of the article lost, or not delivered at the place of destination deducting his freight. The same is substantially the ruling in *Gillingham vs. Dempsey*, 12 Sergeant and Rawle, 183.

The motions are dismissed.

WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motions dismissed.

Columbia, May, 1857.

JACOB F. WITT *vs.* JOSHUA A. JEFCOAT.

Pond Branch is a navigable stream under the Act of 1853.

Where the owner of a mill-dam erected on a stream made navigable by the Act of 1853, allows one to pass rafts of timber through his dam and slope, he cannot maintain an action at common law to recover compensation. To obtain compensation the provisions of the Act must be pursued.

BEFORE WITHERS, J., AT LEXINGTON, SPRING TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

"This was a summary process, to recover compensation from the defendant for passing his rafts through the plaintiff's mill-dam and slope. The claim was resisted on the ground, that the defendant had a right to raft his lumber through the plaintiff's mill-dam and slope, free of charge, on the grounds, that the stream was navigable under the Act of 1825, and also, that he had acquired a right by use and prescription. For a description of the stream and its use, and the erection of the mills by the parties, and those under whom they respectively claim, reference is made to the printed report of his Honor, Judge Wardlaw, in the case of 'Jacob F. Witt *vs.* W. Johnson Jefcoat, Joshua Allen Jefcoat, and John M. Jefcoat,' tried at Lexington, March Term, 1856.

"A non-suit was ordered on the ground, that Pond Branch was a navigable stream, under the Act of 1825."

The plaintiff appealed, and now moved this Court to set aside the non-suit, and for a new trial, upon the ground, that his Honor erred in holding that the defendant had a right to raft through the plaintiff's mill-dam and sluice, or waste weir,

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under the Act of 1825, free of compensation, and that his remedy and right of passage, if any he has, are under the Act of 1853.

Bauskett, for the plaintiff, contended,

1. That Pond Branch, at the place where his mill stands, or at any point, is clearly not a navigable stream, under the Act of 1825. See Judge Wardlaw's report—and the *State vs. Hickson*, 5 Rich. 449; *State vs. Collum*, 2 Spear, 581.

2. That during the time between the Acts of 1825 and 1853, there was no remedy to entitle the owner of an upper to raft through the dam of a lower mill, on a stream not embraced in the former Act, except by permission. To remedy which see Act of 1853, p. 305.

3. That no length of time, of permissive use to raft through a dam, not embraced in the Act of 1825, will confer a right, neither before nor since the passage of that Act; certainly nothing short of the period of prescription.

4. In this case the defendant's mill was not built until after 1833; and so late as 1848, the owners of all three of the mills, including this defendant, put in a new erection, and made arrangements in regard to the terms upon which they might raft through the plaintiff's dam and canal. Judge Wardlaw's Report, p. 3.

Meetze, contra.

The opinion of the Court was delivered by

O'NEALL, J. In this case we concur in the judgment of the judge below.

Pond Branch, by the Act of 1853, 12 Stat. 305, became a

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navigable stream. It was so treated, and considered in the opinion of the Court in the case of this very plaintiff *vs.* W. Johnson Jefcoat, this defendant, and another, decided *here* a year ago. How, after it was thus recognised and decided, at the instance of the plaintiff, he can expect to claim for toll in passing rafts through his mill-dam and slope, as a common law right, is difficult to conceive. For when a stream is navigable, it is common to every one, who may use it: and waste ways and slopes only excuse, under Acts of the Legislature, the dams which obstruct the stream.

The plaintiff, as the owner of a mill dam obstructing the stream before 1853, is provided for by that Act, and under its provision, if pursued, he may get the compensation which it provides. For to pass the dam the means are provided by the 3d sec. of the Act. It declares, "that in all cases, where mill owners shall have erected their mill dams on such streams," (as Pond Branch,) "antecedent to their use for the purposes aforesaid," (rafting) "at the points at which such mill-dams have been or may be erected, it shall be lawful for all persons, who may desire, to *use* such streams for the purposes of navigation as aforesaid, upon payment to such mill owner of a compensation to be determined by *the parties themselves*; but if the parties cannot agree, it shall be the duty of any neighboring magistrate, at the instance of any person, desiring to use such stream for purposes of rafting of rafts of lumber and timber, to call to his assistance four neighboring freeholders, two to be selected by the mill owner, and two by the applicant, and the said magistrate and freeholders shall determine the amount of compensation to be paid by such persons desiring to use such stream, subject to the right of appeal to the next Court of Common Pleas for the district in which the mill may be situated."

This is, it is true, a rather one sided provision, for it is alone to be effectually carried out by the person desiring to pass the mill-dam. Yet I think the owner may compel him

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to give to him the remedy. For he has only to give the person wishing to pass his dam, notice that he cannot pass till the compensation be fixed: then if the parties cannot agree, the person desiring to pass his raft through the dam must apply to a magistrate, and the other proceedings will follow.

In this case the defendant, without agreeing to pay any thing, passed his rafts. The plaintiff having suffered it done has no implied right to reasonable compensation. The Act of 1853, only permitted the party to pass his dam under an ascertained compensation either by agreement, or by the decision of a magistrate and freeholders. Having the means in his own hands to enforce his rights and ascertain his compensation, and having failed to do it, he cannot appeal to the Court to do it for him.

The motion is dismissed.

WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

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WILLIAM L. KIRKPATRICK vs. HUGH W. TAYLOR.

An administrator in Georgia cannot maintain an action in this State upon a note of his intestate, even though it be payable to bearer.

No one can be the bearer of a note which the payee or his legal representative has not transferred by delivery.

BEFORE O'NEALL, J., AT LAURENS, SPRING TERM, 1857.

Action on a promissory note payable to plaintiff's intestate or bearer. The plaintiff's letters of administration were granted in Georgia. The plea was *ne unques* administrator.

His Honor held that the plaintiff could not recover.

The plaintiff appealed on the grounds:

1. Because the plaintiff, being the administrator (in the State of Georgia) of the payee of the note, had a right to bring his action as the bearer of the same; it being a negotiable paper payable to intestate or bearer.

2. Because his Honor, it is respectfully submitted, erred in holding that plaintiff could not recover in this form of action because he had counted as administrator, when such counting was only *descriptio personæ* and intended to show the legal possession of the note in question.

Henderson, for appellant, cited *O'Brien vs. Sauls*, 2 Rich. 332; *Jackson vs. Heath*, 1 Bail. 355; 11 Johns. R. 53; 15 Wend. 640.

Irby, contra.

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Kirkpatrick vs. Taylor.

CURIA, PER O'NEALL, J. The record in this case states that the plaintiff's intestate, was the owner of the note at his death; that the plaintiff administered in Georgia and thereby became the bearer of the note.

It is plain that his administration in Georgia can give him no rights here. *Connover & Co. vs. Chapman*, 2 Bail. 436.

It is clear, too, that no one can be the bearer of a note which the payee or his legal representative has not transferred by delivery.

The plaintiff's whole right rests upon his possession as administrator in Georgia. That no doubt gave him a legal right to recover there as administrator and perhaps there to transfer it. But when he comes into South Carolina, he is here without legal authority to collect the assets of the deceased. He, in the language of the defendant's plea, has never been the administrator: and hence cannot maintain the action.

The case of *Richardson vs. Gower*, decided here at last November sittings, is a decisive authority against the plaintiff.

The motion is dismissed.

WHITNER, GLOVER, & MUNRO, JJ., concurred.

Motion dismissed

Columbia, May, 1857.

WOODWARD MANNING *vs.* PETER DOVE.

- A judgment by confession on sum. pro., taken during vacation, is valid though not entered on the journal.
- The confession endorsed on the process, and signed by the defendant, is, it seems, a sufficient judgment, in such a case.*
- In computing the time of a sheriff's advertisement, the day it commenced and the day of sale, may both be counted : *Semble*.
- A sheriff's deed being an estoppel upon the party as whose property the land was sold, he cannot object to its validity, because the land was not advertised for sale for the full time required by law.
- A question of fraud as to chilling the bidding at a sheriff's sale, is one for the jury to decide.
- Where the description of the land in a sheriff's levy is in general terms, he may, very properly, describe it accurately and fully in his deed.
- In trespass to try titles, a verdict for the land on which the defendant lives is sufficiently definite.
- In trespass to try titles, a survey is not always necessary in order to identify the land. Other evidence may be resorted to for that purpose.
- Where a defendant takes no step towards availing himself of the benefit of the homestead law before levy and sale of his land, it is doubtful if he can do so afterwards.

BEFORE GLOVER, J., AT MARION, SPRING TERM, 1857.

The report of his Honor, the presiding Judge, is as follows :

"The action was trespass to try the titles to a tract of land levied upon and sold by Elly Godbold, Sheriff of Marion district, on the 5th of March, 1855, as the property of de-

* This case may not be held to have settled, conclusively, that the confession indorsed on the process, is itself a sufficient judgment ; for that question does not appear to have been made in the argument, (though the comprehensive language of the ground of appeal is sufficient to embrace it,) and the cautious language of the Court would seem to imply, that it was intended to rule no more than that an entry in the journal was not

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fendant and bought by the plaintiff for three hundred and thirty dollars. The sheriff's deed, conveying three hundred and twenty acres, more or less, described the land by boundaries, which a witness said were correct, and that the number of acres mentioned in the sheriff's deed he also believed correct.

"The levy and sale were by virtue of a *fi. fa.* on a summary process, in favor of N. Phillips and entered in the sheriff's office on the 7th March, 1854, and the judgment was by confession endorsed on the process the same day. There were several other executions against the defendant on which the levy was endorsed, and some having a prior lien to N. Phillips'.

"The sheriff's advertisement, describing the land as that on which the defendant lived, was printed in the 'Marion Star,' a weekly paper, on Tuesday, the 13th February, 1855, but it was prepared on the Saturday preceding.

"The defence was rested mainly on the fraud alleged to

the only judgment. At the bar, with the practice of which the Reporter is familiar, it has been the practice of at least several of the leading attorneys for a number of years past, to enter separate and formal judgments in all sum. pro. cases, whether obtained by decree or verdict, or upon confession in term time, or during vacation. Such judgments—a printed form being used—give little trouble, and have, at least, this advantage, that thereby a formal and regular judgment for costs is entered, whereas, where the judgment is by entry on the journal, there is no mention of costs at all. The question as to the validity of such judgments has never, it is believed, been before the Court of Appeals, but on the Circuit, they have often been held to be valid. In one case, where an action of debt was brought on such a judgment, and a motion for non suit made and argued on the authority of *McCall vs. Boatwright*, and other cases, Judge Evans overruled the motion, saying, there was nothing in the decisions which precluded a party from entering a formal judgment; that on the contrary, the cases, when properly understood, merely ruled, that, in the absence of such a judgment, the entry in the journal would answer for one. No appeal was taken.

R.

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have been practiced by the plaintiff on the day of sale, and the evidence on this point was as follows:

"*Elly Godbold*, sheriff, stated that the plaintiff, on the day of sale, did not bid himself but got Jesse Lee to bid for him. Seemed anxious to know if sheriff would sell, and said he would not give any thing worth for it. Hamer, who had an execution against defendant, and D. Bethea, Col. Phillips and Mr. Miller bid.

"*Robert C. Hamer* inquired of plaintiff respecting the quality of the land, who said it was poor. He did bid, but from the vagueness of the advertisement and the poorness of the land, he was induced to stop his bidding. There was a large crowd. This land had been offered for sale on a previous sale day, and the plaintiff was bidding but quit at the request of witness, and sale was stopped.

"*Col. Phillips* was at the sale, and bid to about three hundred dollars—Mr. Miller said to him, there are five hundred acres, and it is worth five dollars per acre, and plaintiff observed there are only about three hundred acres, and I have land adjoining for which I will be glad to get two dollars per acre, and this had an influence on his bidding, but he cannot say to what extent. There were other bidders after he quit.

"At present prices, the value of this land was estimated at from three to five dollars per acre, and Willis T. Norman stated, that within the last two years, lands there have been sold by the sheriff at one and two dollars per acre.

"I submitted the question of fraud to the jury, and instructed them, that if they believed the plaintiff had chilled the biddings either by the suggestion of what was false or by the suppression of the truth, they would find for the defendant. I do not understand that any exception is taken to the charge in this respect; but it seemed to be insisted that the Court and not the jury is the proper tribunal to decide questions of fraud.

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"The jury found for the plaintiff, 'the land on which the defendant lives and five dollars damages.'"

The defendant appealed, and now moved this Court for a new trial on the grounds :

1. That the presiding Judge charged the jury that the plaintiff had made out a good title: whereas, it is submitted that the plaintiff showed no judgment under which the land was sold by the sheriff.

2. That the plaintiff himself proved by the public advertisement in the Marion Star, that the land in dispute had only been advertised twenty days, to wit: from 13th February, 1855, to 5th March, 1855, the day of the sale, and defendant not being present had no notice of sale.

3. That the presiding Judge should have charged the jury that the facts proved constituted a fraud if believed, because fraud is a question of law for the Judge to decide, and if the facts proved constituting fraud are capriciously rejected by the jury, their verdict should be set aside.

4. That the facts proved and not contested (nor the credibility of the witnesses attacked) constituted fraud, and the presiding Judge should have so charged the jury.

5. That the levy endorsed on the execution did not describe the land conveyed by the sheriff's deed to plaintiff.

6. That the verdict of the jury is void for uncertainty.

7. That the plaintiff did not locate the land in dispute by any competent testimony.

8. That it was in evidence that the cause of action on which

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the alleged judgment authorizing the sale was rendered, arose after the homestead Act of '1851, and the presiding Judge should have charged the jury that a sale of the residence or homestead was illegal.

Miller, Sellers, Bethea, for appellant.

Fraud in a sheriff's sale may be set up by the owner, the defendant in the *fi. fa.*, under which the land was sold, in an action to try title, against the plaintiff, the purchaser, so as to defeat his recovery. *Bradly vs. McBride*, Rich. Eq. Ca., 202. When bidding is stifled, the sale of land by the sheriff will be set aside. *Thrower vs. Cureton*, 4 Strob. Eq. 155; *Martin & Walter vs. Evans*, 2 Rich. Eq. 368; *Carson vs. Law*, Ib. 296; *Hamilton vs. Hamilton*, Ib. 355. Fraud is a question of law for the Court to decide on a state of facts proved. *Smith vs. Henry*, 2 Bail. 124. Fraud makes a sale *absolutely void*, whether the fraud proceed from the vendor or vendee. Ib. 124 and 125, citing *Hildreth vs. Sanders*, 2 John. Ch. 35. The entry on the minutes or journal of the Court, by the Clerk of the Court, is the only evidence of a judgment in the *sum. pro.* jurisdiction. *Boatwright vs. McCall*, 2 Hill, 438. "I know of no other judgment in these cases." Ib. Curia, per Johnson, J.; 2 Mills, Con. R. 247; 4 McC. 291. The production of the judgment is indispensable when the party claims land under a sheriff's sale on a *fi. fa.*, Ib. 438, citing *Barkley vs. Screven*, 1 Nott & McC., 408. See also *Brown vs. Hill*, 3 Hill, 4. The endorsement on the back of the process, of the judgment by the Clerk or the Judge, is not sufficient, Ib. 439. A confession on the process can be nothing more than an authority as in any other case, to the Clerk to enter the judgment on the journals. The verdict is uncertain. *Hayward vs. Bennet*, 1 Tr. Con. Rep. 329; *Jones & Owens*, 5 Strob. 139; *Kirkland vs. Way*, 3 Rich. 4. As to advertising. Act of 1839, sect. 58, 11 Stat. 37; *Lewis vs. Brown*, 4 Strob. 293; *Obannon vs.*

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Kirkland, 2 Strob. 29; *Young vs. Cathcart*, 2 Strob. 221; *Same vs. Same*, 3 Strob. 304.

Evans, contra.

The opinion of the Court was delivered by

GLOVER, J. The several points made will be considered in the order in which they arise out of the grounds of appeal.

1. The defendant's confession endorsed on the process was introduced in evidence, and it is objected, that this is not the judgment within the summary process jurisdiction, unless it be entered on the journal of the Court, and that such entry is the only judgment. The authorities relied upon do not sustain this position in the terms in which it is stated. According to the practice of this Court, the clerk is required to enter such cases as are heard by the judge without the intervention of the jury, and not cases by confession, (*McCall vs. Boatwright*, 2 Hill, 438,) and such a distinction is well founded. In the former case, only the result is briefly stated by the judge on the docket, which would be a very imperfect memorial of a judgment; whereas, the defendant's confession on the record is the act of the party specifying the amount and nature of his indebtedness. If an entry on the journal be the only judgment within the summary process jurisdiction, (and in this unqualified language the position was taken,) it follows, that no judgment by confession in that jurisdiction, can be obtained, except during term time, as the clerk is not authorized to make such entry between terms; and as creditors whose debts exceed the process jurisdiction may enter up their judgments, immediately, upon a *cognovit actionem*, an undue advantage would thereby be secured to them. (*Union Bank vs. Magrath*, 2 Speer, 202.) The clerk's entries, referred to in *McCall vs. Boatwright*, are now regulated by statute.

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The eighth section of the Act of 1839, (11 Stat. 71,) specifies the various entries which the Common Pleas Journal shall contain, and, among others, mentions decrees upon trial before jury or judge, or by default, and confessions during Court.

2. The second ground is, because the sheriff did not advertise the land twenty-one days as the law directs. An examination of the cases respecting the computation of time, justifies the remark of Lord Mansfield, "that much more subtlety than argument has been used to mark a difference in reference to time." (*Pugh vs. Leeds*, 1 Cowp 715.) The general inclination of the Court is to include or exclude the day in the computation, so as to effectuate the deeds of the parties, and not to destroy them. (*Williamson vs. Farrow*, 1 Bail. 611.) Applying this rule and including the day, effect will be given to the sheriff's conveyance. But can a defendant in execution, who continues in possession of the land after a sale by the sheriff, avail himself of this objection in a suit against him by the purchaser? In *O'Neill vs. Duncan*, (4 McC. 246,) it was held, that the title of the sheriff, who is the organ of the law to convey the defendant's right, is the deed of the defendant, and that it operates as an estoppel. He cannot show that the title was not in himself, and that he held as the tenant of another; nor should he be permitted, where no fraud is imputed to the sheriff, to aver against the deed because of an alleged official neglect, depending upon a subtle computation of time.

3. The third position taken, embracing the third and fourth grounds, is, that the facts proved constitute fraud, which is a question of law, and that the judge should have so instructed the jury. There may be circumstances constituting badges of fraud which are conclusive and admit of no explanation, and in such cases the jury should be instructed that they are incapable of explanation. It is not perceived that the circum-

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stances, in this case, conclusively established fraud, or that the fair or fraudulent character of the transaction should not have been submitted to the determination of the jury. That the plaintiff bid by an agent; that he misrepresented the quality, value, and number of acres, and that the biddings were thereby chilled, were circumstances not conclusive of the party's conduct, and admitted of explanation, and any doubts which were created by the evidence the jury must resolve.

The other grounds were not earnestly pressed, and only a brief examination of them will be necessary.

5. Debtors in execution do not generally furnish the sheriff such indicia as will enable him to describe real estate with certainty in his levy; and if, from information received after the levy and sale, he shall more particularly identify the land, the difference between the description in his levy and that in his deed will not defeat the latter. Where the fact of a levy on property is established, a strict conformity between the levy and conveyance, in the description, is not necessary, and for the purpose of ascertaining what land was levied on and sold, we must look to the sheriff's deed. Without a legal levy the sale would be unauthorized and the deed void; but where the levy is fully recited in the sheriff's deed, may the defendant in execution who continues in possession be allowed to aver against the deed of the sheriff, who, *pro hac vice*, is by law made his agent to convey the land? (*O'Neill* and *Duncan*, ante, and *Sawyer vs. Leard*, 8 Rich. 267.) If the description of the land endorsed on the execution differed from that in the deed, there was no evidence showing that it was not the same land.

6. A verdict may be aided by the description in the plat or declaration, and by reference to them or by its own terms, designate the land the jury intend to find. (*Jones vs. Owens*, 5

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Strob. 134.) In a conveyance land may be described by the name of the owner or occupant, and "the land on which the defendant lives" is generally sufficiently definite to enable the plaintiff to take possession.

7. In actions of trespass to try titles, the requirement of the Act is not imperative that a survey shall be made to identify the *locus in quo*, and other evidence may be introduced for that purpose. (*Frean vs. Cruikshank*, 3 McC. 84; *Thomas and al. vs. Jeter and al.*, 1 Hill, 380.) In this case a witness verified the description given of the land in the sheriff's deed, by proof of boundaries, and, to some extent, superseded a survey.

8. It will not be necessary to consider, whether a sale of the defendant's residence was contrary to the Homestead Act of 1851, (11 Stat. 85,) and, therefore, illegal; as the cause of action in one or more of the other cases against the defendant, and on which the levy of this land was endorsed, arose prior to the passage of the Act. It may, however, admit of doubt if the defendant can avail himself of the benefit of that Act after the levy and sale of his domicil and a conveyance to the purchaser, without having taken any steps to make out the fifty acres which are exempted from levy and sale.

We are, therefore, of the opinion, that the appellant can take nothing by his motion.

Motion dismissed.

O'NEALL, WHITNER and MUNRO, JJ., concurred.

Motion dismissed.

Tomlinson vs. Tomlinson.

THOMAS TOMLINSON, sen. vs. MARTHA TOMLINSON AND
THOMAS TOMLINSON, jr.

In an action by a father against the administrators of his son for slaves which the father had allowed to go into, and remain in, the possession of the son, the administrators cannot show the son's insolvency, in order to defeat the action for the benefit of creditors.

BEFORE GLOVER, J., AT CHESTERFIELD, SPRING TERM,
1857.

This was an action of trover for the alleged conversion of fifteen negroes.

The plaintiff was the father of Henry M. Tomlinson, deceased, the intestate of the defendants. In 1833, Henry M. Tomlinson married the defendant Martha, and during that year the negroes were allowed by the plaintiff to go into his possession in North Carolina, where father and son both resided. In 1839, Henry M. Tomlinson removed with his family and the negroes, to Cheraw, and there resided until his death in 1855, the negroes remaining with him the whole time. Much evidence was given on both sides; and for the defendants evidence of the extent of Henry M. Tomlinson's indebtedness and of the value of his property, was given, from which it appeared that, if a certain claim against the estate was established, it was insolvent.

His Honor charged the jury upon the several questions growing out of the evidence, and, *inter alia*, he instructed them that, if they believed the estate of Henry M. Tomlinson was insolvent, the possession and apparent ownership of the slaves by him and by the permission of the plaintiff, for so many years, was a fraud upon the creditors of the intestate

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who trusted him in the confidence of his right of property in the slaves.

The verdict was for the defendants; and the plaintiff appealed, and now moved this Court for a new trial, on several grounds, the sixth and seventh being as follows:

6. Because his Honor charged the jury that if they believed the estate, of which the defendants were administrators, was insolvent; then the fact that H. M. Tomlinson apparently held the slaves as his own, was sufficient to warrant them in finding for the defendants.

7. Because there was not sufficient evidence of the insolvency of the said estate; and it is respectfully submitted that, in this case, where judgment creditors were not before the Court, it was incumbent upon the defendants to show the insolvency of the estate, by the clearest and most conclusive evidence.

McIver, for appellant. The rights of creditors are not involved in this case. They would not be concluded by a verdict for plaintiff; hence there was error in the charge, that, if the estate of Henry M. Tomlinson was insolvent, his long possession and apparent ownership of the slaves with the permission of the plaintiff, was a fraud upon his creditors. *Alexander vs. Maxwell*, Rich. Eq. Cas. 302; *Chappell vs. Brown*, 1 Bail. 528.

Inglis, contra.

The opinion of the Court was delivered by

O'NEALL, J. The defendants are the administrators of Henry M. Tomlinson, deceased. They undertook, and were allowed on the trial of this cause to show his insolvency, so

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that slaves found in his possession, and claimed to be the property of the plaintiff, might, on account of the legal fraud on creditors, be adjudged to be his property. The case of *Crosby vs. Shelton*, cited in *Chappell vs. Brown*, 1 Bail. 531, ruled that an administratrix could not set up the indebtedness of her intestate, as a ground to defeat his gift of chattels. This ruling was recognised, and affirmed in *Anderson vs. Belcher*, 1 Hill, 249, note. These decisions proceed upon the ground, that the administrator represents the person of his intestate, and cannot set up anything which he could not. Here beyond all doubt the deceased could not set up his own indebtedness and insolvency, against his father's claim to property, in his possession.

The motion for a new trial must therefore be granted on the seventh ground, and it is accordingly so ordered.

WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion granted.

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THE STATE *vs.* CHESLEY BOATWRIGHT.

The Rule of Court (97th) adopted November, 1856, directing the mode in which a jury shall be formed for the trial of a prisoner, where the right of peremptory challenge is claimed and allowed, does not violate any provision of the Constitution or Act of the Legislature. The mode of forming a jury in such case, was regulated entirely by practice, and it was competent for the Court to alter the practice and adopt the rule.

BEFORE WITHERS, J., AT KERSHAW, SPRING TERM, 1857.

The prisoner was indicted for the murder of Charles Thomas Evans.

To the organization of the jury under the recent rule of Court, objection was made and overruled.

A party of four, the deceased being one, on their way home from Camden, on the evening of the 14th January, 1857, stopped at the residence of Mary Bowen, with whom the prisoner resided. About ten o'clock a dispute arose about a well bucket, the handle of which Mary Bowen and the prisoner charged some of the party with having broken. After many hard words, the deceased said to the prisoner, "You have packed it on me, and if you will walk up the road you can have satisfaction;" and started off towards the bars, pulling off his coat. The prisoner sprang into the house, seized his gun, advanced two or three steps from the door and fired at the deceased, who was by this time some thirty yards off. Many shot took effect—several in the head—and the deceased fell dead. Such was the case as made by the State. Witnesses were examined for the defence, and the jury, after a full charge from his Honor, found the prisoner guilty.

The prisoner appealed on a number of grounds, which the

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opinion delivered in the Court of Appeals, renders it unnecessary to state.

Caston, Kershaw, for appellant.

Fair, Solicitor, contra.

The opinion of the Court was delivered by

GLOVER, J. The Court has examined this case with that careful and anxious consideration which its importance demands. Not only the character of the offence and the nature of the punishment which follows conviction, but the points submitted, both constitutional and legal, require that the prisoner's appeal shall be decided on mature deliberation.

The first ground alleges "that the presiding judge erred in overruling the motion made by defendant to call over the jury for challenge, in the order in which they appear in the panel." This is almost in terms the same ground which was taken and overruled in the *State vs. Sims*, (2 Bail. 29 ;) but we presume from the whole tenor of the argument, (so fully and earnestly pressed upon the attention of the Court, both in this and in the case of the *State vs. Price*,) that the error which it was intended to specify is—that the jurors were not presented for challenge according to the method prevailing before the adoption of the late regulation on the subject.

The mode pursued by the circuit judge in presenting the jurors for challenge, was in conformity to the 97th Rule of Court, adopted at November Term, 1856, which directs, that "Hereafter in the formation of a jury for the trial of a felony, when the right of peremptory challenge is claimed and allowed, a child under ten years of age, shall, in the presence of the Court, draw one from the names of all the jurors in attendance, which one having answered, shall be presented to the accused, and so on until in regular course the panel may be exhausted or a jury be formed."

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Two objections have been taken in the argument against this regulation :

1. That it violates the 6th Sec., 9th Art., of the Constitution of this State, and
2. That if constitutional, provision has been made in Acts of Assembly, ordering in what manner jurors shall be presented for challenge, and that the 97th Rule, prescribing a different mode, is illegal.

1. The import of the words, "trial by jury as heretofore used in this State," in the article and section of the Constitution referred to, was elaborately considered in the case of *Oregier vs. Bunton*, (2 Strob. 487;) and in answer to the ground taken here, it would be fruitless to attempt to add to the able opinion of Evans, J. Having applied the rules of construction necessary to ascertain the meaning of the framers of the Constitution, and having shown that the Legislature, since the adoption of it, had sustained the views which he, as the organ of the Court expressed, he concludes, that the Constitution intended to preserve inviolably the trial by jury as an institution—as a tribunal for the trial of issues of fact; but that the framers of it did not intend to prohibit all changes in the mode of selecting the jury. The manner of drawing, the qualification, the right of challenge, the mode in which they shall be presented for challenge, &c., are preliminary to the trial, "and do not enter essentially into the idea of a jury trial." To the conclusive reasons on which the decision in *Oregier vs. Bunton* rests, a single remark may be added. It is insisted that the late rule violates the Constitution, and that the practice prevailing before was conformable to it. When the Constitution was adopted, only one jury, a petit jury, was empannelled at the Court of General Sessions, for the trial of all criminal causes; yet the Legislature in 1791, (7 Stat. 271, Sec. 6,) directed that two juries shall always be formed to try

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all issues with which they may be charged. If "trial by jury, as heretofore used in this State," means as it was regulated by the various Acts of Assembly to 1790, then not only the Act of 1791, but the practice before the late Rule of Court and the Rule also, are in violation of the Constitution. As a tribunal to determine all issues of fact, the trial by jury is for ever inviolably preserved by the paramount law; but all the steps necessary to prepare and to organize it, are regulated either by statute or rule of Court.

2. It is insisted that the 97th Rule prescribes a mode of presenting each juror to the prisoner, contrary to the provisions of the Acts of Assembly.

At various times the Legislature has authorized the judges to make rules either for the general dispatch of business, or to carry out the provisions of some special Act. The 4th Sec. of the Act of 1791, (7 Stat. 262,) provides, "that the said Courts may, from time to time, make such just and reasonable rules and orders for the more regular and convenient conducting and effectual dispatch of business therein, as to them shall seem necessary and proper." It is only where the law is silent that rules are adopted to regulate the procedure of the Court; and if the mode in which each juror is required to be presented to the prisoner for challenge, by the 97th Rule, violates an Act of Assembly prescribing a different mode, the rule cannot be enforced.

The Act of 1781, (1 Brev. Dig. 447, Sec. 15,) directs that from the names of the persons who shall have been duly summoned, and shall appear to serve as petit jurors, the chief justice "shall cause twelve persons to be drawn by a child, under the age aforesaid," (ten years,) "and the persons so drawn shall serve on all trials at such Court; but in case any of the jurors so drawn shall be challenged, and the challenge allowed, or shall absent themselves or neglect to attend, that

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then the names of other persons shall be drawn out of the said box or glass, to fill up and complete the said jury." When the Constitution was adopted, this was the mode in which jurors were drawn and presented to the prisoner for rejection; but the Act of 1791, (7 Stat. 271.) introduces material changes in this respect. The 6th section provides, that "out of the whole number drawn and summoned for each of the said County or Circuit Courts, two juries shall always be formed, whose duty it shall be well and truly to try all the issues with which they may be charged, and to execute all the writs of inquiry which may be delivered to them respectively." Instead of one petit jury to serve on all criminal trials at each Court of General Sessions, and one Common Pleas jury to serve in the trial of all civil causes, this Act requires that two juries shall be empannelled to try all issues, criminal and civil; omitting the provision in the Act of 1731, that in case any of the jurors so drawn shall be challenged, and the challenge allowed, &c., the names of other persons shall be drawn out of the box, &c. Neither the Act of 1791, nor any subsequent Act, has directed that any particular order shall be pursued in drawing the names of the jurors to be presented to the prisoner for challenge. The practice prevailing before the late rule of Court was adopted, was to present juries No. 1 and 2 successively, beginning with the foreman of each, and having exhausted them before completing a jury, then to call the other jurors in attendance in the order in which their names were drawn on the first day of the term. This cannot be said to be conformable to an Act which provides but one jury, and when that is exhausted, directs that the names of the other jurors shall be presented as they are drawn out of the box or glass. In support of the appeal, we are referred to the case of the *State vs. Sims*, (2 Bail. 29.) The position taken in that case was, that the jurors should be called in the order in which their names appeared on the panel annexed to the venire; and in reply, Johnson, J., says,

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"A call of the names in the order in which they stood on the venire, is opposed to the positive enactment of the Legislature, and is not sanctioned by the usage and practice of the Court." If the judge meant that it was opposed to the Act of 1731, (the only one making any provision on the subject, and which, in this respect, is superseded by the Act of 1791,) he is strictly correct; for neither by statute, rule of Court, nor by practice, have the names of the jurors been called for challenge in the order in which they are entered on the panel. That was the question submitted and decided in *Sims'* case. Referring to the Act of 1791, the judge also says, "in making up a jury for the trial of a prisoner entitled to challenge, the *uniform practice* is to begin by calling the foreman of the jury No. 1, to be sworn, and then the others of that jury, in the order in which they are drawn; if any are challenged, then to call the names of the jury No. 2, in the same order. If that is exhausted, then the names of the supernumerary jurors are to be drawn from the box or glass, until the jury for the trial of the prisoner is completed." Until the late rule of Court, it was according to this uniform practice, and not by virtue of any statutory regulation, that the jurors were presented to the prisoner for challenge. (*State vs. Brown*, 3 Strob. 508.) What Act directs, that after the two juries are exhausted, the supernumeraries shall be called in the order in which they were drawn on the first day of the term, which, in the *State vs Brown*, is declared to be the established practice; or that their names shall be drawn from the box or glass which, in *Sims'* case, was also referred to uniform practice?

. Trial by jury is guarantied by the Constitution—the right of challenge is secured by legislative enactment, and the mode in which jurors are presented to the prisoner, in his exercise of that right, depends upon practice, or is regulated by rule of Court.

The 97th Rule does not abridge any privilege conferred on

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a prisoner necessary to secure an impartial tribunal and a fair trial. He is entitled to have a copy of the indictment, a list of the panel, and three days are allowed him to prepare for his trial, within which time he may decide upon his challenges, either peremptory or for cause. The innocent may safely trust to juries drawn, summoned and empannelled, as the law and the rule of Court direct, and it cannot be a serious objection to such tribunals, that by them the guilty are sometimes convicted.

It appears from the report, that the second ground of the appeal presents this question,—were the declarations of Mary Bowen to the prisoner respecting threats that Jemima Watts said were made against him by any of the party that night, properly excluded? It is enough that Jemima Watts was not present; but the prisoner had the benefit of such evidence. There was proof that he had heard of these threats from her, and said he never believed them, and could not, therefore, have acted on such threats.

The other grounds allege errors in the charge of the circuit judge, and as this Court approves his instructions to the jury, they will be briefly noticed. The distinction between murder and manslaughter was clearly drawn, and the definition of each correctly given, and the jury was left to apply the principles of law to the circumstances of the case. The evidence does not show that the prisoner killed in self-defence; but if a difference of opinion could be indulged between felonious and excusable homicide, the charge to the jury, in reference to this part of the defence, was calculated to give the prisoner the full benefit of it.

Perceiving no sufficient reason which can avail the prisoner in support of his appeal, the motion for a new trial is dismissed.

O'NEALL, WHITNER, and MUNRO, JJ., concurred.

Motion dismissed.

Galloway vs. Courtney.

ROBERT GALLOWAY vs. JOHN P. COURTNEY.

In slander for charging plaintiff with having broken open the house of A. B., and robbing her of money, failure to give the Christian name of A. B. in the *colloquium*, though it may be good ground for special demurrer, is no ground for motion in arrest of judgment.

The words themselves clearly imputing the crime of larceny, an averment in the declaration, that the defendant intended to charge the plaintiff with larceny, is not necessary.

Defendant may show in mitigation of damages, that, before the words were spoken, what another had said in reference to the same offence as committed by plaintiff, had been communicated to him.

BEFORE WITHERS, J., AT LEXINGTON, SPRING TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

"The action was slander: and the verdict was for the plaintiff for one thousand dollars. The words used by the defendant and made the cause of action, imputed to the plaintiff the crime of breaking into the house of the defendant's sister twice, and robbing her of money.

"As to the declaration, and the alleged defects therein, which are made the foundation of a motion in arrest of judgment, I can say nothing, the same not coming into question before me.

"A witness, introduced by defendant, said that soon after the house was entered the last time, and a robbery was said to have been committed, (which was the subject matter of this slander) he had talked to Evan Prothro about it, and heard something from him about the matter; all he knew about it was from him. The defendant would have brought out from this witness what Prothro said, and that he (the witness) communicated the same to the defendant. It was objected to and

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overruled. But the utmost latitude was allowed to the defendant in putting in evidence, rumors and suspicions as to the plaintiff's guilt in the matter of the house-breaking and robbery, both the first and the last, and the sister of the defendant was heard, at large, upon the transaction on both occasions, the investigation made by her and defendant as to first robbery, (and it may be the last, I am not sure,) and the circumstances that pointed suspicion towards the plaintiff. It did and does yet appear to me, that such a course of evidence rendered it very immaterial whether the defendant heard what Prothro said or not, and among the various rumors and suspicions which, according to the evidence, he did hear, it is not at all improbable what Prothro said was among them, if his authority was not specifically quoted. He was not called as a witness.

"The defendant makes no complaint of the charge to the jury upon law or evidence; it was scarcely, in any wise objectionable, in his view, and so I do not refer to it.

The defendant appealed and now moved this Court, in arrest of judgment, and for a new trial, on the following grounds, to wit:

In arrest of judgment.

1. Because, the declaration is defective in this, that it does not contain, in the colloquium, the name of the person, whose house is alleged to have been robbed, the Christian name being omitted.

2. Because, the declaration is defective in this, that after the statement of the supposed slanderous words, it contains no averment, that the defendant thereby intended to impute to, and charge the plaintiff with theft, robbery or any other crime.

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For a new trial.

Because his Honor, the presiding judge erred, in ruling that the defendant could not give in evidence, in mitigation of damages, that before the uttering of the supposed slanderous words, he had heard reports coming from Evan Prothro and others, imputing to the plaintiff the same offence, where-with he was charged by the defendant.

Fair, Boozer, for appellant, cited on 1st and 2d grounds Steph. on Pl. 302; *Gatty vs. Field*, 58 Eng. C. L. R. 428; 14 M. & W. 410; 15 M. & W. 277; 1 Stark. on Sland. 391, 392, n. 1; 1 Stark on Sland. 417; *Sturgingen vs. Taylor*, 2 Brod. 481; Bul. N. P. 4, 8; 4 Wend. 320; 5 East, 234; 1 C. & P. 400; 28 Eng. C. L. R. 151; and on 3d ground, *Hatton vs. Turnipseed*, Mss.

Meetze, Bauskett, contra, cited 4 Strob. 40; 6 Rich. 419; 2 Stat. 432.

The opinion of the Court was delivered by

MUNRO, J. Exception is taken to the declaration, in the defendant's first ground in arrest of judgment, because the plaintiff has omitted to set out therein the Christian name of the party, whose house is alleged to have been broken open.

To this a sufficient answer will be found, in the ruling of the Court in the case of *Simpson vs. Vaughn*, 2 Strob. 316, where it was held, that although such omission might furnish good ground for a special demurrer, the defect is however waived by pleading the general issue.

The second ground is, that the alleged slanderous words set forth in the declaration, do not charge the plaintiff with the commission of a criminal offence.

It has long been settled, that in actions of slander words are to be construed by a court, and jury, in the same manner

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they were, or ought to have been understood, or construed by the person to whom they were spoken (2 N. & McC. 511) and in *Morgan vs. Livingston*, 2 Rich. 591, it was held, not to be necessary that the words should in terms charge a larceny. "If," says the Court, "taking them altogether in their popular meaning, such is the necessary inference, then there is no doubt they are actionable."

In this case, however, we are spared the necessity of resorting to the popular meaning of the words, for if we accept the technical definition of larceny as given in the books, it would be difficult to select a form of words better adapted to convey the idea of that offence, than do those charged in the declaration to have been uttered by the defendant. Take for example the following, "It was Robert Galloway who broke into his (the defendant's) sister's house, and took the money." And again, "It was the same one who broke the house before; it was he and no one else; and that he stole a rope about fifty feet long."

It is clear then, that upon neither of the grounds in arrest of judgment, can the defendant's motion prevail.

The remaining ground is for a new trial, in ascribes error to the ruling on circuit, in excluding what a witness, introduced by the defendant, had heard one Prothro say in relation to the subject matter of the slander, and which he, the witness, had communicated to the defendant.

It has been settled by a series of decisions in our own courts, that what a party cannot plead in justification, he is permitted to give in evidence by way of mitigation. (1 N. & McC. 268.) Under this rule, a defendant may give in evidence under the general issue,

1st. The plaintiff's general character, without reference to the particular nature of the offence with which he is charged;

2. Facts and circumstances, not amounting to actual proof of guilt, but going to create a suspicion;

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3. Reports and rumors, which may have been in circulation concerning the plaintiff, whether true or false; and all other facts and circumstances which may have any relation to the specific slander, and which are calculated to show the defendant uttered the words charged innocently.

In the recent case of *Hatton vs. Turnipseed*, 11 Vol. *Ms.* p. 120, in answer to an objection taken to the reception of similar testimony to that which was offered in this case, the court said, "Hearsays there were, but they were statements made by witnesses of what they had heard, which either they had testified to, or circumstances showed had been communicated to the defendant.

"The hearsays then, were only proofs of the reports spoken of by every body, and shown by the defendant to rebut the implication of malice.

"The matter to be inquired into, was not the guilt of D. S., nor of Dr. H., but the motive of the defendant. Had he made or exaggerated a charge against the plaintiff, or had he told, what he had heard, what he believed, and what the person he talked to was not ignorant of?"

We are of opinion therefore, that the evidence offered by the defendant was competent, by way of mitigation, and should have been received.

The defendant's motion in arrest of judgment on all the grounds is therefore dismissed—but his motion for a new trial must be granted, and it is so ordered.

O'NEALL, and WHITNER, JJ., concurred.

Motion granted.

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DAVID S. HAYS *vs.* WILLIAM HAYS.

Under a written contract, dated 17th January, 1853, to purchase land at a fixed price no time of payment being specified, purchaser entered, and in 1854 or 1855, vendor gave notice to quit—the purchase money being unpaid—and then brought trespass to try title:—*Held*, that what was reasonable time for payment of the purchase money was a question for the jury; and that question having been submitted to them their verdict for defendant was not disturbed.

BEFORE GLOVER, J., AT MARION, EXTRA TERM, APRIL,
1857.

The report of his Honor, the presiding Judge, is as follows:

“The action was brought to try the title to a tract of land which the plaintiff claimed under a deed from Charles J. Fladger, dated 17th January, 1853. On the same day that the deed was executed the plaintiff signed the following agreement:

“‘This agreement witnesseth that William Hays hath bought a tract of land from D. S. Hays for the sum of five hundred dollars. When the said payment shall well and truly be made, then the said D. S. Hays is to make unto the said William Hays a good and *bona fide* title; the said land containing one hundred and twenty-five acres; the said land known as the John Bass land. Given under my hand and seal, January 17th, 1853.

“‘D. S. HAYS.

“‘Witness, S. A. HAIRGROVE.’

“At the execution of this agreement the defendant went into possession, and still continues in possession. He paid the

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plaintiff thirty-five dollars, which the plaintiff said to a witness, who heard him acknowledge the payment, was for rent. There was no evidence showing that the defendant held the possession otherwise than under the agreement to purchase. Some time in the year 1854, or perhaps in 1855, the plaintiff gave a notice to the defendant to quit.

"I instructed the jury that if the defendant went into possession under the agreement to purchase he was not a trespasser; and held that the notice to quit did not change the terms under which he entered, unless the payment of the purchase money had been delayed an unreasonable length of time, and whether it was or not unreasonable was submitted to them.

"The verdict was for the defendant."

Plaintiff appealed and now moved this Court for a new trial on the grounds:

1. Because the plaintiff having proven a legal title in himself to the *locus in quo*, and that the defendant went into possession under him, his Honor erred in not charging the jury that after the notice to quit, the defendant was a trespasser, and that it was at least their duty to find the land for the plaintiff.

2. Because the evidence on the trial established the fact that the defendant was the tenant of the plaintiff, and that he remained in possession of the premises in dispute after notice to quit, given before the commencement of this suit, and his Honor should have charged the jury that the holding of the premises perversely after such notice, was not only not permissive by plaintiff, but such a disclaimer of plaintiff's title as would entitle him to a verdict for the land, and the arrears of rent by way of damages.

3. That the agreement to purchase, set up by defendant,

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having no time specified for its performance, his Honor as a matter of law, should have charged the jury that more than a reasonable time had elapsed since its execution and the time of the commencement of the suit in which to comply with its condition, and after having failed to comply with the terms of the contract, he had not even an equitable title to set up in opposition to plaintiff's legal title.

Evans, for appellant cited on the first and second grounds, *Hill vs. Robertson*, 1 Strob, 1; *Calhoun vs. Perrin*, 2 Brev. 247; *Anderson vs. Darby*, 1 N. & McC. 369; *Wilson vs. Weathersbe*, Ibid. 373; *Law vs. Dennis*, Harper, 70; *Richardson vs. Broughton*, 2 N. & McC. 417; Chan. Harper's argument in *Williston vs. Watkins*, Carolina Law Journal, 113; *Jones vs. Jones*, 2 Rich. 542; 2 Blackstone's Com. 145; 4 Kent's Com. 112; 1 Cru. Dig. by Greenleaf, 265; *Right vs. Bean*, 13 East. 210. On third ground, *Anderson vs. Darby*, 1 N. & McC. 369; *Sinclair vs. Jackson*, 8 Cowen, 543; *Jackson vs. Pierce*, 2 Johns. R. 321; *Jackson vs. Chase*, Id. 84; *Jackson vs. Lesson*, 2 Johns. Ch. 321; *Jackson vs. Vanslych*, 8 Johns. R. 487; 9 Johns. R. 330; 10 Johns. R. 335; 2 Pars. on Con. 47, 143.

Inglis, contra, cited 10 Wend. 304, 539; 3 Hill. 80; 3 Rich. 74; 6 East. 3; 4 Rich. 24.

The opinion of the Court was delivered by

MUNRO, J. The single point in this case, is that presented in the defendant's third ground of appeal; namely, whether the circuit judge, instead of submitting to the jury the question, as to what would have been a reasonable time within which the purchase money should have been paid—the contract of purchase in this particular being silent—should himself have decided the question, as one of law.

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It must be conceded, that on this branch of the law, the authorities are by no means uniform; but it must at the same time be conceded, that the preponderance of authority is manifestly in favor of the ruling on circuit.

But if we look to the real nature of the question to be passed upon, depending as questions of this sort must necessarily depend, upon extrinsic facts, as also to the impracticability, if not to say utter impossibility of laying down any definite or arbitrary rule as a precedent, for all future cases that may arise, in all the variety of forms into which transactions of this sort may be moulded and fashioned; it is a question, which, we think, is eminently proper to be submitted to a jury.

In *Muilman vs. D'Eguino*, 2 H. Black, 565, it was held that on a bill payable after sight, a reasonable time is allowed the holder to present it for payment, and what was reasonable time was a question for the jury.

And so, too, in *Parker vs. Palmer*, 4 Barn. & Ald. 387, it was held that a purchaser of goods by sample, if the sample does not correctly represent the goods, may repudiate the contract within a reasonable time to be decided upon by the jury.

In *Smith vs. Doe*, 2 B. & Cres. 290, Abbot, C. J., says, in many cases of a general nature, or prevailing custom, the judges may be able to decide the point themselves; in others which may depend upon particular facts and circumstances, the assistance of a jury may be requisite.

This opinion is in strict conformity with what was said by Lord Mansfield, in the case of *Tindall vs. Brown*, 1 T. R. 168, where in speaking of what is reasonable notice to the indorser of non-payment by the drawer of a note, he goes on to remark: "What is reasonable notice, is partly a question of law, and partly a question of fact, &c. But whenever a rule can be laid down with respect to this reasonableness, that should be

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decided by the Court, and adhered to for the sake of uniformity."

In *Wallace vs. Agry*, 4 Mason, 345, Story, Justice, says,—
"What is reasonable time, depends upon the circumstances of each particular case, and no definite rule has as yet been laid down, or indeed can be laid down to govern all cases. The question is a question of fact, for the jury to decide. Such, as I take it, is the doctrine of the authorities."

To the same effect is our own case of *Brock vs. Thompson*, 1 Bail, 322; where on a similar point that arose in the case, the ruling of the Court was in conformity with the ruling in the above cases.

The question then having been submitted to the jury, in a form that meets with our entire concurrence, and they having resolved it in favor of the defendant, the verdict must stand, and the motion be dismissed, which is accordingly ordered.

O'NEALL, WHITNER, and GLOVER, JJ., concurred.

Motion dismissed.

Lumpkin vs. Ferguson.

MIRIAM LUMPKIN, EX'RX, vs. ROBERT FERGUSON.

On a sealed note given by F., principal, and G., surety, separate actions were brought, one against F. and the other against the administrators of G. F. failed to appear, and judgment against him for the whole amount, principal and interest, was recovered. In the other action, only the principal sum, without interest or costs, was recovered, usury having been successfully pleaded:—*Held*, That payment of the judgment against the administrators of G. was satisfaction *pro tanto* only and not in full, of the judgment against F.

Where separate actions are brought on the same demand against A. and B., each equally liable for the whole, and judgment for the full amount is recovered against A., who makes no defence, while B.'s defence, going to part of the demand, is successful, and the judgment against him is for a smaller sum, satisfaction of the judgment against B. is no more satisfaction in full of the judgment against A. than a failure to recover altogether against B. would have extinguished the judgment against A.

BEFORE WHITNER, J., AT CHESTER, SPRING TERM, 1857.

Scire facias to revive a judgment obtained by Troy Lumpkin, plaintiff's testator, against the defendant, Robert Ferguson.

The original cause of action was a sealed note, payable to Adam Wylie, dated the 1st of January, 1840, due the 1st of October in the same year, with interest from date, and signed by the defendant as principal, and one George Gill, as surety.

At Fall Term, 1847, suit was brought by Troy Lumpkin, executor of Adam Wylie, against Robert Ferguson, and also against J. G. B. Gill and John McFadden, administrators of George Gill. No defence was made by Ferguson, and judgment was obtained against him by default, at Spring Term, 1848, for three hundred and fifteen dollars and seventy-five cents, with interest from 1st of October, 1840. The administrators of Gill pleaded usury in defence of the action against them, and judgment was obtained against them at the same term for

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two hundred and eighty-three dollars, this being the amount of the principal of the note, after deducting payments which had been previously made. This sum of two hundred and eighty-three dollars was paid by the administrators of Gill, the 7th April, 1848, and received by Troy Lumpkin.

It was contended on the trial, by the defendant's counsel, that a satisfaction by the administrators of Gill of the judgment against them, and an acceptance by Troy Lumpkin of the money paid thereon, operated a satisfaction also of the judgment against Ferguson. His Honor was of opinion, that the satisfaction of the judgment against the administrators of George Gill, only operated as a payment *pro tanto* of the judgment against Ferguson, and the facts being admitted, he directed the jury to find for the plaintiff.

The defendant appealed and now moved this Court for a new trial.

Because his Honor, the presiding Judge, erred in ruling that the payment and satisfaction of the judgment against the surety, did not operate a satisfaction in law of the judgment recovered against the principal; recovered on the same joint and several obligation by the same plaintiff.

McAlilly, for appellant, cited *Burge on Suretyship*, 120; 1 Poth. on Ob., Art. 8, Sec. 3, p. 133; *Noonan vs. Executors of Gray*, 1 Bail. 487; *Bank of the State vs. Mosely*, 1 Strob. 414.

Hemphill and Gaston, contra.

The opinion of the Court was delivered by

MUNRO, J. That the plaintiff is entitled to but one satisfaction of the several judgments that were rendered against these parties,—both having been rendered for the same debt,—does not admit of a doubt, upon the well recognised principle,

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that where there are distinct judgments against different defendants, for the same debt, all are extinguished, except as to costs, by the satisfaction of any one of them, without regard to the ultimate liabilities of the defendants to each other. See *Davis vs. Barkley*, 1 Bailey, 140; *Noonan vs. Gray*, Ib. 437.

But it is manifest that the rule can only apply, where all the judgments are founded on the same cause of action, and are identical in amount; for were the rule otherwise, the most flagrant injustice might often result from its operation.

Suppose, for example, that at the time that Gill's legal representatives set up the defence of usury, the law in relation to that subject had stood as it did prior to 1831-2, it is clear, that the entire debt of the plaintiff must have been forfeited; or suppose they had resisted the plaintiff's recovery on the ground of their intestate's infancy at the time he became surety to the note; it is equally clear, that, upon either of these grounds, judgment must have been rendered in their favor. Now, where, it may be asked, would be the difference in principle, between the defendant's right to have satisfaction in full entered upon the judgment against him, in either of these supposed cases, although not a dollar of the debt had been paid, and the position assumed in his present judgment.

But, to pursue the subject still further, suppose the administrators of Gill, had made no defence to the action against them, but had permitted the plaintiff to take judgment for the whole amount of his note, interest as well as principal, and that the defendant had set up the defence of usury, and judgment had been rendered against him for the principal of the note, without interest, and he had paid up the judgment in full; or suppose he had successfully resisted the plaintiff's right to recover anything, and judgment had been rendered in his favor, it is obvious that in the first case put, all that the administrators of the surety could have claimed, would have been the right to have satisfaction *pro tanto* entered upon the judgment against them, and in the other case, their

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only remedy would have been an action against the principal for re-imbursement.

But the cases of *Jones vs. Kilgore*, 2 Rich. Eq. 63, and *Stinson vs. Brennan*, adm'r of Crowder, Cheves, 15, are decisive of the question. In the first of these cases, it is said, that "where judgments on the same cause of action, are identical in amount, satisfaction of one, is satisfaction of all; where, however, they are not for the same amount, satisfaction of the one for the smallest amount, is only satisfaction *pro tanto* of the others."

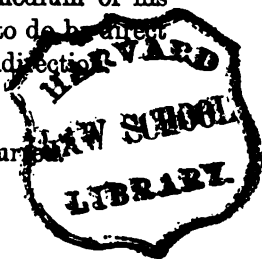
In the last case referred to, the plaintiff had been the surety on a note of the defendant's intestate. He was sued, and let judgment go by default. The administrator of Crowder, the principal, had also been sued at the same term of the Court, defended the case and got a decree in his favor. The defendant contended he was not liable to indemnify the plaintiff who might have prevented the recovery against him; but the Court said, "To the suggestion that the surety might have resisted, and defeated the recovery, he may reply, that he was a stranger to the consideration of the note, and privy to nothing more than the terms of an absolute obligation which he bound himself to make good, if not absolutely fulfilled."

In this case, the defendant is stripped of all pretext of ignorance of the consideration of the note; no one knew better than he did, the objection to which it was obnoxious, and if in the action against himself, he thought proper to decline setting up the defence of usury he cannot now be permitted to avail himself of it through the medium of his surety; in other words, that he was unwilling to do by indirect means, he cannot now be permitted to do by indirect

The motion is dismissed.

O'NEALL, WHITNER, and GLOVER, JJ., concur.

Motion dismissed.



Fant vs. Martin.

JAMES FANT vs. J. C. C. MARTIN AND JOHN SANDERS.

Special injunction requiring defendant in Equity to give bond not to remove a slave, &c., granted by Commissioner, upon condition that plaintiff in Equity give bond to pay all damages defendant might sustain in case of plaintiff's failure in his bill :—*Held*, that the bond given by plaintiff was void—the Commissioner having no authority to require him to give such bond.

The only case in which a Commissioner can require a plaintiff, applying for an injunction, to give bond, is where the application is for an injunction to stay execution or suit at law.

BEFORE WITHERS, J., AT UNION, SPRING TERM, 1857.

The report of his Honor, the presiding Judge, is as follows :

"This was an action of debt founded on a bond taken by the Commissioner, preliminary to a writ of injunction granted against this plaintiff, 'to restrain him from removing a certain slave without the jurisdiction of the Court' of Equity, and 'to compel him to enter into bond with surety, not to remove the slave without the jurisdiction, and to have the slave forthcoming to abide the order of the Court.'

"A bill in Equity, it appeared, had been filed against the present plaintiff, at the instance of Mrs. Eleanor Martin, *feme covert*, by her next friend, J. C. C. Martin, claiming the slave, alleging an apprehension of her removal, with a prayer for 'a writ of *ne exeat regno*,' and a 'special injunction.' The Commissioner had made an order, that 'on J. C. C. Martin entering bond with surety,' &c., 'to James Fant,' conditioned 'to pay or satisfy the said James Fant all damages he shall sustain in case the complainant shall fail to maintain her action,' &c., 'that a writ of injunction do issue from this Court, to restrain,' &c., as above set forth.

"The bond was entered into by these defendants, in conformity with the order; and an injunction granted. The

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present plaintiff was arrested, and in turn entered into the bond required, and on the hearing of the case the bill was dismissed.

"The present suit was brought to Spring Term, 1856. It appeared, further, that a *fi. fa.* had issued for tax cost, amounting to one hundred and twenty-five dollars and sixty-four cents, and a *ca. sa.* likewise. On these there was a return of '*nulla bona*,' and '*non est inventus*,' to October Term, 1856, being the Term next after the return Term of the writ in this case.

"The Commissioner in Equity was examined, and produced the original papers. He proved that there had not been any order from the Court of Equity, directing this bond to be placed in suit—that he would not have granted an order for injunction, except the preliminary bond was given—that the usual fee for conducting such a defence as was made in this case in Equity, was one hundred or one hundred and fifty dollars; perhaps the former would have been a proper compensation, and he knew of no other injury or damages sustained than arose from the moneys expended by the present plaintiff, and that he had supposed the bond would cover only tax costs. It was further understood that a sum sufficient to meet the costs had been deposited somewhere, perhaps with surety Sanders, to abide this suit.

"On closing his case by the plaintiff on this evidence, a motion was made for non-suit, on the grounds to be found in the notice of appeal.

"Notwithstanding my doubt whether a case was made on which plaintiff could recover, I declined to entertain the motion; and no evidence being offered by defendant, the case was submitted to the jury. That the case might be presented before the Court of Appeals in such a state that the litigation might be ended by the judgment of that Court, the jury was directed to include in their assessment of damages, all claimed by plaintiff on his proof, to wit: the tax cost and counsel

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fee—these amounts, one hundred and twenty-five dollars and sixty-four cents, and one hundred dollars, constituting the sum of two hundred and twenty-five dollars and sixty-four cents. For this sum the verdict was rendered. It may be proper to observe that complainant set up title to the slave under the will of her father; and it was alleged, and seemed to be conceded, that though no reasons were assigned in the order dismissing the bill, it proceeded on the ground that the marital rights had attached, &c.

The defendants appealed, and now renewed their motion for a non-suit or new trial.

Arthur, for appellant. The bond is void: the Commissioner exceeded his powers in requiring it.

1. The powers of the Commissioner to grant injunctions are conferred by Act of Assembly, and there is no power given to require bond of plaintiffs, except where judgments at law are enjoined. A. A. 1721, 1 Brev. Dig., 200; A. A. 1784, Id. 203; A. A. 1791, Id. 205, 207; A. A. 1808, Id. 212; A. A. 1734, 7 Stat. 189; A. A. 1784, Id. 209, 279; A. A. 1825, Id. 330; A. A. 1840, 11 Stat. 108, sect. 5, 7, 8, 13, 17.

2. Where Commissioner exceeds his powers in requiring bonds, they are held void. *Norris vs. Williams*, 8 Rich. 58; *Commissioner vs. Phillips, et al.*, 2 Hill, 631; *Aldrich vs. Kirkland*, 8 Rich. 348.

If bond is valid for the taxed costs, plaintiff's right of action had not accrued when suit was brought. If the bond is analogous to a trover bond under A. A. 1827, plaintiff must show illegal conduct to recover more. *Brown vs. Spann*, 3 Hill, 324; *DeHay ads. Ferguson & Dangerfield*, 2 McM. 228.

Counsel fees should not have been allowed. *DeHay ads.*

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Ferguson & Dangerfield, 2 McM. 228; *Glenn ads. Jeter*, 9 Rich. 374, and cases there cited; *Gadsden vs. Bank of Georgetown*, 5 Rich. 336.

Dawkins, Gadberry, contra.

The opinion of the Court was delivered by

MUNRO, J. It has been repeatedly adjudged by this Court, as also by the Court of Equity, that under the powers conferred by the eighth section of the Act of 1840, (11 Stat. 110,) upon Masters and Commissioners in Equity, "to grant injunctions, both special and common, in conformity to the rules and practice of the Court," that they also possess the power, as incidental thereto, of compelling a defendant to give security to abide the order of injunction, for the forthcoming of the property in litigation. See *Ellis vs. Commander*, 1 Strob. Eq. 188; *Norris vs. Williams*, 8 Rich. 58; *Aldrich vs. Kirkland*, Ibid, 349.

The only instance, however, in which a Court of Equity has ever required a party complainant applying for an injunction to give security, has been where the application was made by a party seeking relief from a verdict, or judgment at law.

Upon applications of this sort, it was formerly the practice of that tribunal, before granting the injunction, to require the complainant, who was the defendant in the action at law, to deposit a sum equal to the amount of the verdict, or judgment.

The practice of requiring a deposit in such cases, having been found to be attended with much inconvenience to suitors, the legislature, with the view of remedying this inconvenience, in the year 1784, (see 7 Stat. 209,) passed an Act, requiring the party applying for such injunction, in lieu of the deposit, "to give bond in such sum, and in such condition as the Court shall direct."

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From that period, down to the present time, it is believed that the practice of that Court in granting injunctions against proceedings at law, has been in strict conformity with the requirements of this statute.

Prior to the year 1840, the power of granting such injunctions was vested exclusively in the Chancellors. In that year, however, the legislature, by the tenth section of the Act already referred to, thought proper to confer upon the Masters and Commissioners in Equity, concurrent authority with the Chancellors, upon condition, however, that before granting such injunction, they should require the applicant to execute a bond as required by law in such case.

From this brief examination into the authority of Masters and Commissioners, to grant injunctions, as also the mode and manner of exercising it, whether as prescribed by legislative enactment, or by the rules and practice of the Court of Equity; it is manifest, that in no case, except where the application for an injunction, is "for stay of proceedings in any action, or upon any judgment, or execution at law," has a Commissioner authority to require of the party making the application a bond or other security, preliminary to granting such injunction; this being the case then, the conclusion is irresistible, that so much of the order made by the Commissioner, as required the defendant, Martin, the *prochien amie* of the complainant in the suit in Equity, to enter into bond, in the condition therein recited, was wholly unauthorized, and without even the semblance of legal authority to sustain it. We are therefore satisfied that the defendant's ground for a non-suit is well taken, and that their motion must be granted, which is accordingly ordered.

O'NEALL and WHITNER, JJ., concurred.

Motion granted.

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ANDREW SMOKE vs. JAMES D. SMOKE.

Where in trespass to try title the defence is, that S., an entire stranger, had acquired title by adverse possession, the fact that S. had, many years before the trial, abandoned the possession, and that neither he nor any one claiming under him, had since ever claimed the land, is entitled to consideration upon the question as to the character of S.'s possession, whether it was adverse or not.

Where such a defence is set up, the extent of the claim and the limits of the possession must be shown.

BEFORE MUNRO, J., AT BARNWELL, SPRING TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of trespass to try titles. The plaintiff proved title in himself to one-sixth of the land in dispute, which was a tract of one hundred and fifty-three acres, part of a large tract of ten thousand acres granted to John Rutledge, (Dec. 5th, 1785,) from which plaintiff showed meane conveyances to himself.

"The defendant relied upon a possessory title, alleged to have been acquired by one David Steedly, adverse to the title of Rutledge and his grantees. On this point, one James Tucker, a witness, seventy-seven years old, testified, that above fifty or sixty years ago, the said Steedly took possession of a portion of the Rutledge tract, and enclosed it by lines of marked trees. The surveyor, under the direction of this witness, attempted to locate the land, thus said to have been marked out, and the plat produced shows that the lines designated by the surveyor, included all the land claimed by the plaintiff, except a few acres at one corner. This witness also stated, that David Steedly remained in possession for

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twenty or thirty years, and then left it. It did not appear that since Steedly went away, either he or any one claiming under him, ever claimed the land by virtue of his title. The main question involved in the case, was the identity of the land marked out by Steedly, with the land designated as such by the surveyor. By reference to the plat, it appeared that the surveyor could find no corner except such as belonged to the Rutledge tract, a part of one line of which was adopted as the base line of the Steedly tract. No interior corners were found or designated, and no station or marked trees were represented, (except one pine on the extreme upper portion,) save certain stations at points of intersection with the lines of the Rutledge tract, and of the plaintiff's tract.

"The witness, Tucker, did speak of one of the interior corners as having once existed, and afterwards disappeared, as a stake in a stump, but upon the cross-examination, it appeared to be a corner on a base line of the Rutledge tract, and was so represented by the surveyor on his plat.

"It did not appear that Steedly had ever had a plat or conveyance of the land. The question as to the identity of the land claimed by Steedly, was submitted to the jury, and they were told that unless satisfied as to its identity, they should resolve that question in favor of the plaintiff. The plaintiff's counsel urged to the jury, that the long absence of Steedly, and the omission of all subsequent claim under his title, were circumstances raising a presumption against the original integrity of his title; and on this point I stated to the jury, that it would have been more satisfactory if some account had been given of Steedly.

"As to the trespass, David Maxcy stated that he had been placed upon the land by the defendant, on a contract to plant on shares, and while he was there in possession, some of the negroes under his charge, by mistake, cut down about seven trees, on the portion of the plaintiff's claim, outside of the Steedly lines, as represented on the plat. The jury were told,

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that for this the defendant was liable. But it was also proved by Maxcy, and admitted by the defendant, that the defendant had cleared land which was common to the Steedly claim, and the plaintiff's tract.

"The rent of the land during the five years the defendant was in possession, was proved to be about thirty dollars per annum. The jury found for the plaintiff one-sixth of the land in dispute, and five dollars damages."

The defendant appealed, and now moved this Court for a new trial, on the grounds:

1. Because his Honor charged the jury that the defendant was responsible for trespasses committed by slaves, (not the defendant's) outside of defendant's claim, when it was established by the only testimony on that point, that the trespasses were committed by said slaves contrary to the express order of one Maxcy, to whom the defendant had sold trees within his (defendant's) claim.

2. Because the verdict was contrary to the evidence in this; that it was clearly and abundantly proved, by the uncontradicted testimony of James Tucker, that fifty-five or sixty years ago, David Steedly had possession of the tract of land in dispute, and from thence continually for twenty-five or thirty years. That he had cleared and fenced from thirty to forty acres, and under color of title, to wit, by plain and notorious marked trees and corners had claimed the land as his own, for the period of his occupancy.

3. Because his Honor should have charged the jury that if the title to the land had ever passed from the grantee to Steedly, by the adverse possession of the latter, Steedly's subsequent removal from the State could make no difference, and the verdict should have been for the defendant.

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4. Because his Honor said to the jury, that the fact that no one claimed as Steedly's heirs or distributees, was a matter of importance to look to. Whereas, it is submitted, that it had nothing to do with the case, and was prejudicial to the defendant's case, who had in Court a deed from Steedly's distributees, but did not introduce it, because he did not consider he had any claim if Steedly had none.

Owens, for appellant.

Hutson, contra.

The opinion of the Court was delivered by

GLOVER, J. The plaintiff's title from the grantee through several lessors, was clearly established to one-sixth of the land in dispute. The defendant, showing no title in himself, relied upon the possession of David Steedly, who had remained on the land for twenty years or more, and who had abandoned his possession for thirty years, and neither he or any one under or through him having since ever claimed this land by virtue of his title. Referring to this possession and its abandonment, the presiding Judge remarked to the jury, "that it would have been more satisfactory if some account had been given of Steedly," and this is made one of the grounds on which the motion for a new trial is submitted. The defence relied upon was a possessory title in a stranger, and the defendant assumed to show, that the possession on which such a title rests, was not only adverse, but was held in reference to well defined boundaries. The abandonment of a possession for more than thirty years, was a circumstance entitled to consideration in ascertaining if Steedly held adversely or not. (*McBeth vs. Donnelly*, Dud. 177.) But the defendant failed to prove the extent of Steedly's claim, or to

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define the limits within which his possession, if adverse, would confer a title under the statute.

A trespass by the defendant was proved, not only by the acts of his slaves, under the control of Maxcy; but he cleared a part of the land, the rent of which, *per annum*, for the five years he was in possession, was estimated at thirty dollars.

The appellant has, therefore, failed to establish either ground taken in support of his motion, which is dismissed.

O'NEALL, WHITNER, and MUNRO, JJ., concurred.

Motion dismissed.

City Council vs. Stelges.

THE CITY COUNCIL OF CHARLESTON vs. J. STELGES.

A penalty not exceeding twenty dollars, for violation of an Ordinance of the city of Charleston, may be recovered before the Recorder, without the aid of a jury, although the defendant demand one.

BEFORE MACBETH, R., IN THE CITY COURT OF CHARLESTON.

The report of his Honor, the Recorder, is as follows:

"This was a suit by way of Summary Process, for twenty dollars, for an alleged breach of 22d Sec. of an Ordinance of the City Council of Charleston, ratified 29th November, 1836, entitled, "An Ordinance regulating retailers of spirituous liquors, &c." When the case was called for trial, the defendant's counsel demanded a jury, which I refused. The witnesses for the plaintiff proved the violation of the Ordinance, and there being no defence offered, I decreed for the plaintiff, twenty dollars.

"A practice appears to have grown up in this Court, of submitting suits brought for penalties incurred by the violation of the Ordinances of the city, where such penalties do not exceed twenty dollars, to a jury for decision. I feel it, therefore, incumbent on me, to submit my reasons for refusing a jury in this case. The City Court of Charleston was established by an Act of the Legislature, passed 19th December, 1801; 2 Faust, 392. The first sec. of the said Act establishes the Court, and gives it jurisdiction to try *all* offences against the by-laws of the city of Charleston. The third section of the same Act provides that all issues, controversies and litigations, in the said Court, *of which the value* shall exceed the sum allowed by law for the jurisdiction of a single magis-

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trate, shall be tried by a jury. By an Act of the Legislature, passed 21st December, 1799, 2 Faust, 318, the jurisdiction of a single magistrate was fixed, as far as regards the amount, to twenty dollars. It would, therefore, seem, from the above Acts of the Legislature, that a jury was not necessary to try offences against the by-laws of the city in the City Courts, except in cases where the value shall exceed twenty dollars.

It is objected that this is a penal action, and that, therefore, a trial by jury is necessary. Whether it is competent for the Legislature to empower any magistrate to try cases for penalties, where the sum does not exceed twenty dollars, I shall not inquire, as the suit in this case, although for a penalty, I do not regard as a penal action. The obligations of a corporator to keep inviolate the Ordinances and By-Laws of the Corporation of which he is a member, are based upon his assent to them, either express or implied. Angel & Ames on Corporations, 301. The debt which he incurs for a violation of any of them, is, therefore, *quasi ex contractu*, and is recoverable by an action of debt, or *assumpsit*. Com. Dig. By-Law, D. I."

The defendant appealed on the grounds:

1. Because, being a penal action for the alleged violation of a City Ordinance, he should have been allowed a trial by jury.

2. Because the decree was otherwise contrary to law.

Pope, for appellant.

Porter, City Attorney, contra.

The opinion of the Court was delivered by

O'NEALL, J. The first section of the Act of 1801, 7 Stat.

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301, established the City Court and conferred upon it a concurrent jurisdiction with the Court of General Sessions of the Peace and Common Pleas, but limited the jurisdiction in the Court of Sessions to offences against the By-Laws of the Corporation.

The 3d § declares that "all issues, controversies and litigations in said Court" (the City Court) "of which *the value* shall exceed the sum allowed by law for the jurisdiction of a single magistrate, shall be tried by a jury," &c.

The case before us, it will be remembered, is a sum. pro. for the recovery of twenty dollars, a fine incurred by the owner of a shop for a violation of the City Ordinance, 22d. §, Ordinance of 1836 City Ordinances, 223.

The question would hence seem to be of easy solution, by answering the question, what was the sum allowed by law to the jurisdiction of a single magistrate?

By the Act of 1788, 7 Stat. 247, the jurisdiction of a magistrate where County Courts were established, was declared to extend to five pounds, equal to twenty-one dollars and forty-three and one-third cents. In 1791, 24 §, 7 Stat. 277-8, this jurisdiction was also conferred on magistrates where County Courts had not existed. County Courts never existed in Charleston, Beaufort or Georgetown.

The Constitution of 1790, Art. 9, § 6, provides, that, "the trial by jury as heretofore used in this State shall be for ever inviolably preserved." No doubt this referred to the then existing laws—and wherever a trial by jury had not been previously taken away, it was in all time to come to exist. A magistrate's jurisdiction existed in every part of the State, (except the three districts already mentioned) for the trial of all cases of debt without a jury. No doubt this was *that*, by which the Constitution was to be understood. The cotemporaneous construction was to that effect. For the Legislature, in 1791, conferred the jurisdiction in cases of debt to

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five pounds on magistrates, where the County Courts had not existed.

In *White vs. Hendrick*, 1 Brev. 470, an Act of the Legislature increasing the jurisdiction of a magistrate to thirty dollars was adjudged to be unconstitutional, as infringing 9 Art., 6 §, of the Constitution.

I take it therefore to be plain, that a magistrate's jurisdiction, as high as five pounds—twenty-one dollars and forty-three and one-third cents,—is perfectly constitutional, and so far under the Act of 1801, establishing the City Court, the City Recorder may try and decide cases without a jury.

But it is argued, that a magistrate cannot hear a case for a penalty under twenty dollars. This is true, as was decided in *Anderson vs. Fowler*, 1 Hill, 226. But the reason is plain, the jurisdiction to hear such cases has not been given to him. If it had been, as it has been to the Commissioners of the roads, and the town and village Corporations, there would be no doubt that he could try such cases, and enforce them by execution as the Commissioners of roads, town and village Corporations, impose and collect fines under twenty dollars. In the Act of 1801, the jurisdiction is conferred on the Recorder.

The motion to reverse the Recorder's decision is dismissed.

WHITNER, GLOVER and MUNRO, JJ., concurred.

Motion dismissed.

State vs. White.

THE STATE OF SO. CA. vs. JOHN WHITE AND OTHERS.

Where a fund, being in the hands of an Ordinary, under a mistaken notion as to his right to receive and hold it officially, was paid over to his successor, who threatened suit unless it was paid over:—*Held*, That the sureties of the successor, he having wasted the fund, were not liable for it.

BEFORE O'NEALL, J., AT ABBEVILLE, SPRING TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of debt on the bond of the defendants, as the sureties of F. W. Sellick, deceased, late Ordinary of Abbeville, to recover for Mourning Roberts the sum of two thousand five hundred and sixty-two dollars and twenty-five cents.

"It appeared by the will of Benjamin Beall, (deceased,) that after the bequest of his negroes to Lucinda Gray, he bequeathed the balance of his estate, real and personal, to Mourning Roberts, with this direction and trust, that it should 'be turned into ready money, and the money to be put out to interest, and after deducting all necessary expenses, the amount of interest to be paid over annually to the said Mourning for her use and benefit.' The testator appointed James Calhoun, trustee and executor, 'with full power to carry this my last will and testament into effect. And should the aforesaid James Calhoun, refuse to act, or dies, or removes from the district, then it is my will that the Ordinary, for the time being, for the district of Abbeville, *appoint a trustee to the said Mourning, and successor to the said James Calhoun.*'

"Mr. Calhoun qualified and converted the residue into

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money, and paid the interest during his life to the said Mourning.

"James Calhoun died, leaving a will: his son William Henry Calhoun was appointed executor and qualified. He applied to the Ordinary, David Lesly, Esq. by the consent of Mourning Roberts, that he, the said David, as Ordinary or trustee, or as a derelict estate, should take charge of the fund, then two thousand six hundred dollars, but reduced by charges then made to two thousand five hundred and sixty-two dollars and twenty-five cents.

"This sum, Mr. Lesly, as Ordinary, received, and applied the interest as directed by the will until Mr. Sellick was elected.

"He required the payment of the fund to him, and Mr. Lesly, although advised that he was not legally bound to pay it over to him as Ordinary, yet, to avoid a law suit, paid the money to him.

"Mr. Sellick was Ordinary at his death, and his estate proved insolvent. He had the entire fund in his hands, or had used it for his own purposes.

"The plaintiff claimed first, to charge the defendants, the sureties, for the fund, as a derelict estate coming to the hands of Sellick, Ordinary, by operation of law. Second, That Sellick received the fund *colore officii*.

"I was against the plaintiff on both grounds. Beyond all doubt it was not a derelict estate. The Ordinary, Lesly, ought to have appointed a trustee; or if he was to be trustee, (as he was the Ordinary,) he should have been appointed by the Court of Equity. When Sellick became his successor as Ordinary, he had no claim whatever to the fund.

"Sellick had no *color of office* whereby he received the money. It is true he claimed the money as such, but he had no sort of pretence of right.

"I ordered a non-suit."

State vs. White.

THE STATE OF SO. CA. vs. JOHN WHITE AND OTHERS.

Where a fund, being in the hands of an Ordinary, under a mistaken notion as to his right to receive and hold it officially, was paid over to his successor, who threatened suit unless it was paid over:—*Held*, That the sureties of the successor, he having wasted the fund, were not liable for it.

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"It appeared by the will of Benjamin Beall, (deceased,) that after the bequest of his negroes to Lucinda Gray, he bequeathed the balance of his estate, real and personal, to Mourning Roberts, with this direction and trust, that it should 'be turned into ready money, and the money to be put out to interest, and after deducting all necessary expenses, the amount of interest to be paid over annually to the said Mourning for her use and benefit.' The testator appointed James Calhoun, trustee and executor, 'with full power to carry this my last will and testament into effect. And should the aforesaid James Calhoun, refuse to act, or dies, or removes from the district, then it is my will that the Ordinary, for the time being, for the district of Abbeville, appoint a trustee to the said Mourning, and successor to the said James Calhoun.'

"Mr. Calhoun qualified and converted the residue into

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money, and paid the interest during his life to the said Mourning.

"James Calhoun died, leaving a will: his son William Henry Calhoun was appointed executor and qualified. He applied to the Ordinary, David Lesly, Esq. by the consent of Mourning Roberts, that he, the said David, as Ordinary or trustee, or as a derelict estate, should take charge of the fund, then two thousand six hundred dollars, but reduced by charges then made to two thousand five hundred and sixty-two dollars and twenty-five cents.

"This sum, Mr. Lesly, as Ordinary, received, and applied the interest as directed by the will until Mr. Sellick was elected.

"He required the payment of the fund to him, and Mr. Lesly, although advised that he was not legally bound to pay it over to him as Ordinary, yet, to avoid a law suit, paid the money to him.

"Mr. Sellick was Ordinary at his death, and his estate proved insolvent. He had the entire fund in his hands, or had used it for his own purposes.

"The plaintiff claimed first, to charge the defendants, the sureties, for the fund, as a derelict estate coming to the hands of Sellick, Ordinary, by operation of law. Second, That Sellick received the fund *colore officii*.

"I was against the plaintiff on both grounds. Beyond all doubt it was not a derelict estate. The Ordinary, Lesly, ought to have appointed a trustee; or if he was to be trustee, (as he was the Ordinary,) he should have been appointed by the Court of Equity. When Sellick became his successor as Ordinary, he had no claim whatever to the fund.

"Sellick had no *color of office* whereby he received the money. It is true he claimed the money as such, but he had no sort of pretence of right.

"I ordered a non-suit."

State vs. White.

THE STATE OF SO. CA. vs. JOHN WHITE AND OTHERS.

Where a fund, being in the hands of an Ordinary, under a mistaken notion as to his right to receive and hold it officially, was paid over to his successor, who threatened suit unless it was paid over:—*Held*, That the sureties of the successor, he having wasted the fund, were not liable for it.

BEFORE O'NEALL, J., AT ABBEVILLE, SPRING TERM,
1857.

The report of his Honor, the presiding Judge, is as follows:

"This was an action of debt on the bond of the defendants, as the sureties of F. W. Sellick, deceased, late Ordinary of Abbeville, to recover for Mourning Roberts the sum of two thousand five hundred and sixty-two dollars and twenty-five cents.

"It appeared by the will of Benjamin Beall, (deceased,) that after the bequest of his negroes to Lucinda Gray, he bequeathed the balance of his estate, real and personal, to Mourning Roberts, with this direction and trust, that it should 'be turned into ready money, and the money to be put out to interest, and after deducting all necessary expenses, the amount of interest to be paid over annually to the said Mourning for her use and benefit.' The testator appointed James Calhoun, trustee and executor, 'with full power to carry this my last will and testament into effect. And should the aforesaid James Calhoun, refuse to act, or dies, or removes from the district, then it is my will that the Ordinary, for the time being, for the district of Abbeville, *appoint a trustee to the said Mourning, and successor to the said James Calhoun.*'

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"I ordered a non-suit."

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time to the purchaser, but how long, the witnesses could not say—one witness, Mr. McDowell, was sure “it was beyond the first sale day after the sale;” that it was understood W. L. Pickett was to be the purchaser at a sum not less than two thousand six hundred dollars; and that immediately after the sale, Cathcart transferred his bid to Pickett with the knowledge and consent of the defendant, who made a memorandum to that effect. It further appeared that the execution of S. R. Johnston was under stay until the 1st November, 1844.

When the plaintiff closed his case a motion was made for a non-suit which his Honor overruled.

The verdict was for the plaintiff, against the charge of his Honor, who held, that no breach of defendant's bond had been shown, resulting in injury to Thomas Lumpkin.

The defendant appealed, and now moved this Court for a non-suit. 1. Because the plaintiffs, as administrators, were not entitled to maintain the action; and 2. Because the damage resulted from the act of Sheriff Cockrell in re-selling: and, failing in that motion, then he moved for a new trial on numerous grounds, resting mainly on the positions, that the only judgment, that of Troy Lumpkin, which bound the land at the date of the conveyance to A. F. Lumpkin, having been satisfied before the re-sales in November, 1844, and February, 1845, the purchaser at the last re-sale acquired no title, and no injury therefore resulted from the same which could be charged to the defendant, or of which Thomas Lumpkin or his personal representatives could complain; and that the postponement of the sale by the judgment creditors, who gave time to the purchaser, excused the defendant, and exonerated him from all liability.

Buchanan, Boylston, for appellant.

McAuley, contra.

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The opinion of the Court was delivered by

GLOVER, J. The action is brought by the State of South Carolina, for the benefit of the administrator and administratrix of Thomas Lumpkin, against the defendant, late sheriff of Fairfield District, on his official bond, to recover the difference between the price bid at a sale and a re-sale of a tract of land, levied upon and sold as the property of Thomas Lumpkin, in his lifetime.

The statement copied into the report from 9 Rich. 443, with the additional evidence introduced on the second trial, furnishes all the important facts in the case, and upon which a verdict was rendered for the plaintiff. Many questions have been submitted for consideration, growing out of the defendant's grounds of appeal; but the decision of the case must depend upon the enquiry, Has any breach of the defendant's official bond been established, by which Thomas Lumpkin sustained damage.

It is argued, that the defendant, as sheriff, and by virtue of a *fi. fa.* against Thomas Lumpkin, levied upon and sold a tract of land as his property, and the terms of the sale not having been complied with, he failed to re-sell at the risk of the defaulting purchaser, either on that or on the next succeeding sale day, as the Act of 1839 (11 Stat. 26, Sec. 58,) directs, and that he is liable for the damages which have resulted from this neglect. In excuse of this alleged default, the defendant proved, that the judgment creditors of Thomas Lumpkin agreed, before the sale in February, 1844, to give time to the purchaser at sheriff's sale; it being understood that W. L. Pickett was to be the purchaser, at not less than twenty-six hundred dollars: and Mr. M'Dowell is certain that the credit allowed to the purchaser extended beyond the sale day succeeding the sale. A postponement of the re-sale of the land was, therefore, at the instance of the judgment creditors, and was justified by the provisions of the Act of 1839. W. L. Pickett having failed to comply, the land was

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advertised by the defendant for re-sale in November, 1844, at the risk of the defaulting purchaser; but as his official term had expired a few days before, Cockrell, his successor in office, re-sold the land, when W. L. Pickett becoming the purchaser at two thousand dollars, and not complying, Cockrell again re sold in February, 1845, to Mobley, for eight hundred and thirty-five dollars, who complied with the terms of sale and received titles. From these subsequent proceedings, if irregular, what liability has the defendant incurred? If the judgment creditors extended the time for a re-sale, he did not violate the law by the delay; and the two re-sales were conducted by his successor in office, Cockrell. But if by his default, the alleged breach of defendant's bond had been established, can the legal representatives of Thomas Lumpkin recover? On the 2d March, 1843, and before a sale by the sheriff, Thomas Lumpkin, in consideration of five thousand dollars, conveyed this land in fee to A. F. Lumpkin, who held it subject to no other lien except a judgment in favor of Troy Lumpkin, which was fully satisfied on the 1st May, 1844, and therefore long before the first re-sale. What title or interest had Thomas Lumpkin in the land after he had conveyed to A. F. Lumpkin? The satisfaction of the only judgment which bound it before any title was made to Mobley, would seem to protect him against any damages for a breach of his warranty, and it may admit of grave doubt, if the re-sale and purchase by Mobley have divested the title of A. F. Lumpkin. We do not, however, propose to investigate or decide upon the rights of persons not parties to the suit, nor does the occasion require us to ascertain the liability of any other than the defendant. As all the judgments against Thomas Lumpkin were satisfied by the defendant before November, 1844, except the one in favor of Johnston, which was paid from the proceeds of the re-sale to Mobley, the rights of creditors are not before the Court.

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The proof in this case has not established the legal liability of the defendant, and as a verdict for the plaintiff would be without evidence to support it, the defendant's motion for a non-suit is granted.

Motion granted.

O'NEALL, WHITNER, and MUNRO, JJ., concurred.

Motion granted.

Price vs. Moses.

D. W. PRICE vs. A. J. MOSES.

P. assigned goods to M. to cover his liabilities to the firm of M. & M. and to M. M. allowed the goods to be taken by W., another creditor of P. :—*Held*, that M. had no right so to dispose of the goods, and that he was liable to P. for the value.

M. was bail for P. to W. :—*Held*, that, because of his contingent and possible liability as bail, he had no right to retain the goods, or their value, to meet that liability.

An attorney is not an incompetent witness for his client, because of his interest in the costs. It is proper, however, that before being examined, he should withdraw from the management of the case, have another attorney substituted in his place, and release his possible right to costs.

BEFORE WITHERS, J., AT SUMTER, SPRING TERM, 1857.

The report of his Honor, the presiding Judge, is as follows:

“The plaintiff sued in *assumpsit*, upon demands set forth in the ‘bill of particulars.’ The defence was founded on a mistake of the plaintiff’s particulars of demand generally, and upon discount. I was very soon led to the opinion that a court of law was not the best forum for the adjustment of such mutual accounts and liabilities as existed between the parties. The justice of the case I did not think was made manifest by the evidence, and I commended the whole affair to the jury, with the recommendation to do the best they could with the material before them, and I suppose they did; though I can’t tell upon what statement of accounts they made up the result, nor have I any idea whether they are right or wrong in the abstract, though it will be difficult to show, from the information before them, that their verdict is erroneous. It is impossible, I apprehend, to set forth such a case by a report, in even the very subdued light in which it appeared at the trial, but I will try :

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"October 22d, 1851, Price, the plaintiff, 'assigned, delivered, bargained, and sold,' to Moses, the defendant, 'all the goods and chattels' then in his possession, being such as he had purchased 'for carrying on the tailoring business;' also, 'all rights and credits to him appertaining of what nature whatsoever. This assignment,' (says the paper,) 'to cover any liabilities to the firm of A. J. & P. Moses, as to A. J. Moses.' The evidence traced to the hands of A. J. Moses, as derived from this assignment, sums as follows, at dates following:

"1852.		
"Jan'y 19, Money by hands of F. Sumter, -	-	\$ 20 00
"Nov'r 15, do. do. do. -	-	103 56
"1855.		
"April 24, Money by hands of F. Sumter, -	-	4 47
"1851.		
"Oct. 31, Goods valued per receipt of Moses, to be sold and applied in part satisfaction of assign- ment to Moses, (before mentioned,) 22d March, 1851, - - - - -	-	195 98
"1852.		
"March , Proceeds of negro Molly, mortgaged by Price to Moses, and sold under mortgage, -	-	600 00

"The evidence as to the last two items was, that Price had contracted a debt to Wiley, Lane & Co. for seven hundred and ninety-six dollars and fifty-six cents, which was sued, and judgment obtained, October 16, 1852, for eight hundred and fifty-one dollars and forty-five cents, debt, damages and costs. Moses had become guarantor for five hundred dollars of said debt, and Molly was mortgaged to counter-secure him for that liability. Likewise, on the day the assignment was executed, (22d October, 1851,) Moses became the bail of Price in the suit of Wiley, Lane & Co., and the stock of goods (one hundred and ninety-five dollars and ninety-eight cents) was taken

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by Lane, who said that they were inventoried at too high a price, and he would give Price credit on the judgment (when obtained, I suppose,) for their original cost, which he would ascertain when he went to Charleston. 23d March, 1852, Moses paid to Wiley, Lane & Co., four hundred and fifty-six dollars and twelve and a half cents. They caused him to be sued, and directed a discontinuance, he paying nine dollars and thirty-eight cents cost in that case. A question was discussed before the jury, whether the amount of goods (one hundred and ninety-five dollars and ninety-eight cents) was discharged by allowing them to go into the hands of Wiley, Lane & Co., Price's creditors, and to be applied to their judgment, or whether Moses was not bound to apply them exclusively to his debts and those of A. J. & P. Moses, by virtue of the terms of the assignment, which specified that they were (together with the 'rights and credits') to 'cover' those 'liabilities.' Moses contended that the word '*liabilities*' would embrace his undertaking as *bail* for Price, but there was no evidence he had incurred, or ever would incur, any damage from that source.

" Besides the guarantee for five hundred dollars, and the cost of the action of Wiley, Lane & Co., nine dollars and thirty-eight cents, Moses established the following items of discount, (besides interest,) namely :

" Note dated October 29, 1853, (I know not when due,) 107 17

" Note (balance) due July 12, 1851, 39 88

" Fee paid for drawing mortgage of Molly, 15 00

" Recording and expenses of foreclosing the same, . . . 19 50

" He claimed commissions on moneys collected under the assignment, which was resisted on the ground that they were collected by Mr. Sumter, and considered commissions charged by him.

" Upon an execution of Price vs. Mitchell, Moses had collected between forty and fifty dollars, which was not charged in Price's bill of particulars; but the receipt of that money

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was admitted, against objection, on the ground that such sum might well be regarded as *payment pro tanto*, of counter demands held by Moses against Price. The precise sum involved by this question is represented by my notes to be forty-eight dollars and forty-seven cents.

"The item in the discount, stated as 'E. S. Higgins' Decree,' was an execution of Higgins *vs.* Price. It was uncertain who Higgins was, whether he was flesh and blood, or a man of straw. Moses would have claimed this item, but there was no assignment of the *fi. fa.* or judgment, and it was ruled out. In the sheriff's book was a memorandum as to this *fa. fi.*; 'it belongs to A. J. Moses,' but by whose authority that was stated, did not appear.

"I persuade myself that the materials upon which the jury had to work are disclosed above. Out of them they made a verdict for Price for three hundred dollars."

The defendant appealed and now moved this Court for a new trial, on the grounds:

1. That the verdict is contrary to evidence in this, that there was no proof of any indebtedness of the defendant to plaintiff exceeding the defendant's discount as proved.

2. Because there was no proof of the amount found.

3. Because his Honor allowed the plaintiff to offer in reply new evidence of a demand not set forth in the bill of particulars, viz: forty-eight dollars alleged to be received on a judgment against Mitchell.

4. Because the defendant had a right to retain what was in his hands (if any) to meet his liability as bail for the plaintiff, at the suit of Wiley, Banks & Co.

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5. Because his Honor erred in ruling that Mr. Hammet (one of plaintiff's lawyers) was a competent witness in behalf of said plaintiff.

6. Because the jury must have attained the result, viz: Three hundred dollars by foolishly charging the defendant with one hundred dollars (being six hundred dollars, price of negro less five hundred dollars, irrespective of discounts,) and adding thereto one hundred and ninety-six, dollars value of the goods transferred to Wiley, Banks & Co. for which defendant was clearly not liable; or, perhaps, by adding to the said one hundred dollars, about two hundred dollars which plaintiff claimed (contrary to proof,) for the merchandise, in addition to the said one hundred and ninety-six dollars, thus adopting the insinuation (arguendo) of plaintiff's counsel, that plaintiff being a drunken fellow, the defendant had prevailed on him to make an inventory and take a receipt for one hundred and ninety-six dollars, instead of four hundred and nine dollars, or by some other estimate equally foolish and unjust.

7. Because the verdict is contrary to law, the defendant not being liable to account to the plaintiff under the circumstances as declared on and proved, and therefore a non-suit will be suggested to the Appeal Court, more especially as the verdict is without and contrary to evidence.

Bellinger and Moses, for appellant.

J. S. Richardson, Jr., contra.

The opinion of the Court was delivered by

WHITNER, J. We concur with the presiding Judge, that the forum for the adjustment of these accounts has not been

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happily selected. Appellant has addressed himself with great zeal and diligence to the task of demonstrating the errors of this verdict, and the array of figures and authorities set before us seemed to promise success. We have not discovered the exact process by which the jury reached their conclusion, but after a patient hearing and review, we are able to perceive that upon a proper statement of the accounts, on the case made by the evidence, the verdict should not be disturbed.

The contest in our judgment is narrowed to the questions growing out of the charge for the goods assigned and the small item of cash received upon the *fi. fa.* in *Price vs. Mitchell*. The other elements of the account need no comment.

The assignment of the goods and the receipt of defendant, after inventory taken, show the understanding between the parties as to supposed value, and the disposition to be made. They were assigned, "to cover liabilities to the firm of A. J. & P. Moses, as (and) to A. J. Moses." Their value was estimated at "one hundred and ninety-five dollars and ninety-eight cents," and the receipt stipulates "*to be sold and the proceeds applied in part satisfaction of the assignment.*" When plaintiff demands his account, it is no just answer by defendant that the goods were transferred by him to Wiley, Lane & Co., in part payment of a demand due them by plaintiff—that defendant had become bail contemporaneously with the assignment cannot alter the view. *Non constat* that there was an admitted liability even to Wiley, Lane & Co., much less to the defendant—to the day of trial there was no evidence as the Judge well remarks, that defendant *had incurred* or *ever* would incur any damage from that source. If the assignment was intended as an indemnity for a possible contingency that might arise out of this transaction likewise, its terms are wholly inapt—undertaking to specify the objects, "*liabilities to A. J. & P. M. and to A. J. M.*"—the implication arises that no others were contemplated. No such default has been shown at that time or since, on the part of plaintiff as creates a *liability* to defendant.

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The guarantee was otherwise provided for and has been met, though I may remark in passing, that a mystery was left over this part of the case, that might well have justified a harder measure to defendant, in default of a better showing on his part. When sued on his guarantee for five hundred dollars, on payment of four hundred and fifty-six dollars and twelve cents, and costs incurred, the suit was discontinued, and the Court was informed of no further payment.

In reference to the other item arising on the Mitchell execution, it does not appear to have been taken into the account by the jury at all. If included, certainly not injuriously to defendant, for if he was charged with this sum, he must have been allowed some charge on his discount to which he was not entitled. It is very clear this item was competent in any event under the circumstances of its presentation only as a payment to defendant's discount, and this was the view taken by the Judge on Circuit. No injustice has been done to defendant in this.

The account on the case made is easily stated. Estimates of interest, to the same day were submitted to the jury in their consideration of the bill of particulars and the discount set up.

The cash paid over through Mr. Sumter, and the goods, at the only estimate of value before the Court, constitute the sum of	\$324 01
Interest on these sums, computing on the goods from the day of payment, (23d March, 1852,)	100 78
Proceeds of sale under mortgage, . . .	\$600 00
Less guarantee, \$500; jail fees, \$6 50; advertising and selling, \$10; tax costs, \$9 38,	525 00
Balance sales, \$74 12, and interest to same day, \$34 38; aggregate,	98 50
Making sum established by plaintiff,	\$523 29

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Amount brought forward,	528 29
Defendant established on his discount,	
notes of plaintiff, \$107 17, and \$39 88;	
fee for mortgage, \$15; recording, \$3, .	\$165 05
Interest on these sums to day of computa-	
tion,	44 93
	—————\$209 98
Leaving a balance due plaintiff of . . .	\$313 31
	—————

If the verdict therefore had been for a larger amount than three hundred dollars, it would have been satisfactory to this Court, unless there can be shown some more substantial objection.

I proceed therefore to inquire very briefly into the general grounds on which appellant rests his motion for a new trial.

When Mr. H——, one of the lawyers of the plaintiff was offered as a witness, on objection made, it appears he announced his purpose to withdraw, and did in fact take no further agency in the management of the case. There was no order of substitution, and no release of any possible benefit by a recovery of costs, each of which would be eminently becoming in the cases which arise occasionally, where, in the progress of a cause, the ends of justice may require the examination of the lawyer. The advocate and the witness should not be mixed up in the same case, and in all instances where it is known before the commencement of a suit that an attorney is to be a witness, he should decline the position of an advocate. But when this Court is called on to exclude the attorney, it can only be on the score of interest, direct and immediate. The right to tax his costs in the event of recovery is through his client, who in fact is liable to him on failure to recover, or failure to collect even after judgment recovered. Special circumstances may bring the attorney within the rule where he is entitled to a conditional fee, or has himself under-

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taken any indemnity for costs or the like. The objection cannot at all stand on that policy which protects confidential communications between attorney and client. In such case the attorney is not only not required to testify, but will be restrained from any disclosures made under this relation. Though the Judge is silent in his report on this ground, we learn by statement and concession of counsel, that the testimony given became wholly immaterial in the progress of the case, and was so regarded on all hands.

This Court has been earnestly pressed upon the point raised in the fourth ground of appeal, that, as bail, the defendant had a right to retain the fund in his hands to answer this liability. Could we see, as springing out of the contract between the parties, that the funds in hand had been pledged for any purpose of indemnity, we would see our way more clearly in holding the hand of the plaintiff even in a law Court. But the assignment was to cover *plaintiff's liabilities* then existing to the firm of A. J. & P. Moses, and to A. J. Moses. It is a mistake to say that defendant was a surety in possession of assets, which by agreement were to be applied to the debt of Wiley, Banks & Co. If the position may be entertained, it must be upon the actual state of the case as we find it. The defendant has a fund, received by him for a specified purpose which being discharged, he is called on to pay over the excess. On the case made by plaintiff, there is a clear legal obligation on the part of defendant to pay. Defendant replies his right to retain as a set off—hence we find in his discount, "Wiley, Banks & Co's. assessment" being then in judgment, against the plaintiff. This is presented in the nature of a cross-action; but this debt having neither been paid by defendant, nor assigned to him, nor any step yet taken whereby his liability even was fixed, it is manifest no action could be maintained. The relation of creditor and debtor, as between the parties before the Court, as to this transaction, had not attached.

The defendant then stands before this Court upon his

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alleged equity, that he should be protected against an injury or loss that may befall him. It is only necessary to pursue this inquiry a few steps further, to disclose the hazard of a great injustice to the plaintiff, and the utter inability in this jurisdiction to render a proper judgment touching the matter.

The plaintiff has not even been advertised by a special plea that such a point was to be raised in his case. How then could he be prepared to meet the issue tendered for the first time in the evidence. If it is not maintainable as a term of his contract or upon the discount set up, or upon any lien which the law affords for purposes of policy, as in the case of a factor, how could it operate otherwise than as a surprise. By way of illustration, before any forum it is manifest, that the equity relied on arises from the alleged insolvency of the plaintiff, and yet, he is in no way informed that such a question would be raised. Again, as to the judgment we are called on to pronounce. The remedy asked is in the nature of an injunction, and how long shall payment be withheld, and how are we to be assured that a greater injustice may not be done to plaintiff, resulting from an interference on our part to restrain even a judgment under the circumstances. Besought to prevent an act of gross injustice amounting almost to dishonesty by restraining a principal from collecting a debt from the bail, when the principal may be left to pay the debt, we are to guard against the possibility that in this way we may not inflict the still greater injustice of leaving the fund in the hands of one whose equity is not yet perfected, either by the payment of the money to the original creditor, or into the Court, thus protecting it from hazard, subjecting the plaintiff to the double risk of loss by the default of the bail, and the eventual payment of the original debt.

I will pursue the inquiry no further. Though edified by the earnest discussion of the equitable doctrines supposed pertinent to the case, and also by a careful examination of the authorities cited to sustain them, we are not convinced the

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defendant is entitled to the relief suggested, in the form of a non-suit. On the contrary, we are entirely satisfied that the plaintiff is entitled to his *judgment* so hardly earned.

The motion for a new trial is refused.

O'NEALL and MUNRO, JJ., concurred.

GLOVER, J., absent from indisposition.

Motion refused.

CASES AT LAW,
ARGUED AND DETERMINED IN THE
COURT OF ERRORS OF SOUTH CAROLINA,

Charleston, January Term, 1857.

ALL THE JUDGES AND CHANCELLORS PRESENT,
EXCEPT GLOVER, J.*

CARSTEN VOSE, ADM'R OF JOSIAH DANGERFIELD, *vs.* R. S.
H. HANNAHAN.

A deed of gift of slaves, accompanied by a secret trust, that the "slaves shall be held in nominal servitude only," though declared "void and of no effect," by the third section of the Act of 1841, (11 Stat. 155,) is nevertheless good, not only against the donor, but, also, against his administrator after his death. Such deed is void, only "for the benefit of the distributees or next of kin of the donor;" and they alone, it seems, can impeach it under the provisions of the Act.

BEFORE GLOVER, J., AT CHARLESTON, FALL TERM, 1856.

The report of his Honor, the presiding Judge, is as follows:

The action was trover to recover damages for the conversion of eleven slaves, Eve and her eight children and two grandchildren. The intestate, in his lifetime, and at his death,

* Absent, holding the Circuit Court for Charleston.

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was in possession of these slaves. The defendant claimed them by virtue of a deed from the intestate, executed on the 12th May, 1852, and a few days before his death. By this deed, the intestate reserved to himself a life-interest with a remainder to the defendant, Mr. Brewster, who drew the deed at defendant's request, read it over twice to the intestate, and explained its contents, who said that it was in accordance with his instructions, and was exactly what he wanted. When a will was suggested, he said he wanted something permanent, and that could not be changed. Neither the defendant nor intestate expressed an intention to make the slaves nominally free. Intestate said to Tim. Johnson, that he wished to make his children (Eve's issue,) free, and desired defendant to act for him. He got a copy of the deed to show to Mr. Eggleston, and to know if any advantage could be taken of it. It appeared that he drank much, but was sober when the deed was executed. There was no connection by blood or marriage between the defendant and the intestate, who left surviving him brothers, as his distributees.

The plaintiff resisted the deed on the ground, that there was a secret trust between the intestate and the defendant, that such slaves should be held in nominal servitude only, and that said deed was void under the Act of 1841, (12 Stat, 154,) and also that the deed was obtained by the fraud and imposition of the defendant; and, therefore, is void.

I instructed the jury, that if they were satisfied there was such a secret trust, or that the deed was obtained by fraud, they should find for the plaintiff, the legal representative of the intestate, who, in that event, would be entitled to hold them under the Act of 1841, either for distribution among the next of kin, or for payment of debts. These seemed to me to be the important questions presented, and the attention of the jury was called to the evidence, certainly without prejudice to the defendant's claim. The verdict was for the plaintiff, for the value of the negroes.

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The defendant appealed on the grounds :

1. Because, his Honor, the presiding Judge, charged the jury, simply, that if they were of opinion that the deed was obtained by fraud or imposition, they should find for the plaintiff, whereas he should have charged as requested, that if the deed had been so obtained, it could not be impeached by the administrator in this form of action.

2. Because, under the Act of Assembly, 1841, the present action could not be sustained by the administrator in the face of a deed made by his intestate, and that his Honor, therefore, erred in charging the jury, simply that if they were of opinion that the deed was accompanied by a secret trust, to find for the plaintiff.

3. Because, the verdict, in either event, was wholly unsupported by the testimony.

The case was first argued in the law Court of Appeals at January Term, 1856, and was ordered to this Court, where it was now heard.

Simonton, for appellant. The deed cannot be impeached by the administrator in this form of action. The distinction is between executory and executed contracts. If in this case the contract had been executory, and the defendant had called upon the Court to assist him in obtaining possession of the property in question, the objection to the validity of the deed would have been a sound one on the part even of the administrator. But here the contract is executed, the defendant is actually in possession of the property, and the administrator cannot successfully invoke the aid of the Court to set aside the deed upon the ground of fraud, his intestate having participated in the illegal transaction. *In pari delicto potior*

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est conditio defendentis. *Broughton vs. Broughton*, 4 Rich. 491; *Osborn vs. Moss*, 7 Johns. R. 161; Bac. Abr. Fraud. C.; *Collins vs. Blantern*, 1 Smith. L. C. 165; 4 Phil. Ev. 612, n. 304, 615; 1 East, 97; Doug. 466; 8 Johns. R. 113; 17 Eng. C. L. R. 244, 1 Bay, 461; 2 Hill, Ch. 613.

The Act of 1841 does not declare the deed void as between the parties. Wherever a deed is declared void by statute, it is universally understood *quoad* certain persons or purposes. A deed void for want of registration, is good between the parties. A deed void for fraud will enable the donee to hold the property as against any one except the person defrauded. The same construction has been given to the Acts of 1795, 5 Stat. 271, respecting gifts to a mistress or bastard children. *Ford vs. McElray*, 1 Rich. Eq. 475; *Breithaupt vs. Bauskett*, 1 Rich. Eq. 467; 2 Strob. Eq. 193; 3 Rich. Eq. 99. Under the Act of 1841, the deed is void only as to the distributees or next of kin. As between the parties it is good. If Dangerfield, instead of reserving a life estate, had given the whole estate to Hannahan, he would have held the slaves in trust for the next of kin of the donor. But so long as Dangerfield lived no one could attack the donee's title, for the Act gives the slaves to the distributees or next of kin, and *nemo est hæres viventis*; and besides, it was uncertain who would be the next of kin or distributees. Until his death then, the deed would be valid and binding. Now if Dangerfield could not have maintained trover for the negroes, can his administrator do so? The action should have been by the distributees or next of kin. *Bethel vs. Stanhope*, Cro. Eliz. 811, and *Dougherty vs. Dougherty*, 2 Strob. Eq. 67, cited and explained.

Porter, Yeaton, contra.

Petigru, in reply.

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The opinion of the Court was delivered by

O'NEALL, J. The question in this case is, whether the Judge below was right in instructing the jury that if they believed there was a secret trust between the plaintiff's intestate, and the defendant, that the slaves conveyed by the intestate's deed to the defendant should be held in nominal servitude, that then the deed would be void, under the Act of 1841, and they might find for the defendant.

The 3d sect. of the Act of 1841, 11 Stat. 155, declares "that any bequest, gift, or conveyance of any slave or slaves accompanied with a trust, or confidence, secret, or expressed, that such slave or slaves shall be held in nominal servitude only, shall be void and of no effect, and every donee, or trustee holding under such bequest, gift or conveyance, *shall be liable* to deliver up such slave, or slaves, or held to account for the value, for the benefit of the *distributees or next of kin* of the person making such bequest, gift or conveyance." Under this clause of the Act it is first to be inquired, is this deed, (supposing a secret trust to be established) *ipso facto* void as against the donor himself? It appears to me to be clear upon the words of this statute itself that it is not. For although the words are "void and of no effect" yet it is followed by words, which show that the estate is in the donee as against the donor. For the donee is declared "*to be liable* to deliver up such slave or slaves, or held to account for the value." These are enough to show, that the legal title was to remain in the donee, until he was called upon by some one entitled under the Act to make the claim for the delivery, or an account for the value. Who under the Act could make such claim? The donor! Certainly not, for it is to be for the benefit of the "distributees, or next of kin" of the donor. Such persons, as occupy these characters, after the death of the donor can alone make this claim. The words "void and of no effect" used in our Act of the Legislature do not necessarily make the deed void, *as of course*. They are generally

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used in the sense of may be "avoided." Such has been the construction in the various cases arising under our registry laws. *Tait vs. Crawford*, 1 McC. 265; *Mansell vs. Steel*, 6 Rich. 437.

The great question, in this case, is whether the plaintiff, the administrator of the donor, can set up the secret trust to defeat the deed of his intestate?

The words of the Act, as I have quoted and commented on them, clearly show that he is not the person to make the question. I think too there is no clearer proposition in the books than that an administrator cannot dispute the title of his intestate's donee to personal property in possession, or conveyed by deed. As to the latter (property conveyed by deed) I put it alongside of property in possession. For a deed by its delivery, carries the property the same as is done by manual tradition and delivery in the case of a gift by words.

On the proposition "that an administrator cannot dispute the gift of his intestate" I shall be under no necessity of appealing to authorities out of the State, though I may refer to some cases in the English books to explain positions assumed in the argument. The first of our own cases, to which I refer is *Shelton vs. Crosby*, decided in Columbia, not reported, (but which will be I hope with this case). In *Chappell vs. Brown*, 1 Bailey, 531, Judge Evans states the ruling of Judge Johnson who delivered the opinion of the Court to be as follows: "If it be true, that the intestate was in debt, and insolvent, and that a voluntary gift is void as a fraud on creditors, there is no doubt, that as creditors, they would be entitled to relief, but the plaintiff sued as administratrix, and in that character represents the person of her intestate, and is estopped to say he had committed a fraud."

In *Chappell vs. Brown*, the defendant an administrator had been charged with the value of property found in the possession of the intestate at his death, and which the defendant

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had delivered to donees, on the allegation of gifts. This Court held the administrator was improperly charged. Judge Evans, delivering the opinion, said, "If they" (the donees) "did derive their title in this way" (as a voluntary gift,) "and Love (the intestate) did give them the negro and horse, then I take it to be very clear, that these gifts though void as to creditors could not be disputed by Love's administrator."

In *Anderson vs. Belcher*, 1 Hill, 249, a, it was ruled, that an administrator could not dispute the voluntary conveyance of his intestate, in a case where the rights of creditors were attempted to be enforced by seizing the property, under an execution against the administrator for the debt of the intestate. The same doctrine was repeated in the same case subsequently tried but antecedently reported. 1 Hill, 246.

These cases very clearly and fully show, that the administrator cannot make the allegation, which renders his intestate's deed void. He is legally regarded, as *his intestate*, and it never has been allowed, when parties are *in pari delicto* that one should claim the aid of the Court to divest the possession, or legal estate of the others.

In *Hawes vs. Leader*, Cro. Jac. 271, it was held that an administrator cannot avoid his intestate's gift on the ground that he was in debt. In *Bethel vs. Stanhope*, Cro. Elizabeth, 810, it had been previously held that a voluntary donee might be charged by a creditor as an *executor de son tort*, and in *Tucker vs. Williams*, Dud. 329, this ruling was carried out, and a voluntary donee was charged as an *executrix de son tort* with the debt of the deceased donor. But these principles cannot help the plaintiff, as was supposed in the argument. The defendant can only be so charged by the creditors of the deceased, if he had any. The plaintiff is undertaking to dispute the defendant's title by showing that his intestate and the defendant combined together to do that which the law forbade. He is estopped *in pais* by his character from making that allegation.

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The case of *Collins vs. Blantern*, 2 Wilson, 341, was much relied upon by the plaintiff: that was an action, on a bond given to compound a prosecution for perjury. It was held the action could not be sustained, inasmuch as the consideration was *illegal* and *the bond therefore void*. There is no doubt, that decision was right, but it cannot help the plaintiff, for there the aid of the Court was asked to enforce the illegal instrument. Here the defendant is in possession, and the attempt is by the representative of his *particeps*, to deprive him of his possession: the aid of the Court is not sought to enforce the deed, but to set it aside. This the plaintiff cannot claim.

It was supposed, that because a deed conveying goods won at gaming was void, and that the loser might recover them back, or their value if over ten pounds, that by analogy, it ought to be held that a deed conveying slaves, which by the Act of 1841, is also declared void, would not estop either the donor or his administrator in recovering them back. The Stat. of 9 Anne by its second section (2 Stat. 566,) gives to the loser, if he sues within three months, the right to sue and recover. There is no such provision, in the Act of 1841, and that distinguishes the case in hand from that under the Statute of Anne.

The case of *Hockaday ads. Willis*, 1 Speer, 379, affirms that the title of the winner after three months is good against the loser, showing that the statute alone enabled the loser to recover, and not the provision that the deed is declared to be void.

After this review of authorities I think it may be affirmed, that it is without precedent to sustain the attempt now made by an administrator to dispute the gift of his intestate. The law is indeed uniformly laid down by the authorities to be, that he *cannot dispute a gift made by his intestate*. The Act of 1841 by the words used in the third section, plainly show that none save the "*distributees or next of kin*" were intended to

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divest the legal estate, which the conveyance of the donor conferred upon the donee under a secret trust, that "the slaves shall be held in nominal servitude only."

It hence follows, as the administrator, the plaintiff, cannot set up the secret trust to defeat his donor's deed, that the instruction below was wrong in that respect.

The motion for a new trial is granted.

JOHNSTON, DUNKIN and WARDLAW, CC., and WITHERS, J., concurred.

MUNRO J., had been counsel for the defendant, and did not hear the cause.

Motion granted.

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THE STATE EX REL. RHETT & ROBSON vs. H. L. PINCKNEY,
TAX COLLECTOR.

An Act of 1854, imposed a tax on "the amount of sales of goods, wares, and merchandise," &c.: *Held*, that where the sales were of goods brought from other States and sold by the importer in the original packages, they were nevertheless liable to the tax—not being exempt from State taxation by any provision of the Constitution of the United States.

So long as Congress forbears to exercise the constitutional power to regulate commerce among the several States, each State may, for itself, and within its own limits, regulate such commerce.

In the clause of the Constitution prohibiting a State from laying duties on imports, the term imports embraces only articles from foreign nations subject to the payment of duties to the United States, and not merchandise carried from one State to another.

Imports are exempt from State taxation only so long as they remain the property of the importer in his warehouse, in the forms or packages in which imported. When the packages are sold, or broken up, and the goods mixed with the general mass of State property, they are not protected from State taxation. So also, it seems, a tax upon the importer, estimated by the amount of his sales, is not unconstitutional, even though his sales embrace imported articles.

BEFORE MUNRO, J., AT CHARLESTON, FALL TERM, 1855.

The report of his Honor, the presiding Judge, is as follows:

The motion in this case is for a prohibition, to restrain the respondent, the tax collector for the parishes of St. Philip's and St. Michael's, from enforcing the payment of a tax, on the amount of sales of goods, wares, and merchandise, imposed by an Act of the Legislature passed on the 21st day of December, A. D. 1854, entitled, "An Act to raise supplies for the year commencing in October, 1854."

The clause of the Act imposing the tax in question is in

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the following words: "There shall be raised and paid into the public treasury of this State, for the use and service thereof, ten cents upon every one hundred dollars of the amount of sales of goods, wares, and merchandise, embracing all the articles of trade for sale, barter, or exchange, (the products of this State, and the unmanufactured products of any of the United States, or territories thereof, excepted,) which any person shall have made, from the first day of January in the present year, to the first day of January, 1855, either on his, her, or their capital, or on account of any person or persons, as agent, attorney, or consignee."

The suggestion sets forth, that the relators are merchants in the city of Charleston, trading under the name of Rhett & Robson; and that between the 1st day of January, 1854, and the 1st day of January, 1855, they imported into the said city, large amounts of produce from other States in the United States, and where the said several products were manufactured, to wit, flour in barrels from the States of Georgia, North Carolina, and Pennsylvania; beef in barrels, and plaster, from the State of Maryland; nails in kegs, from the States of Maryland and Virginia; and molasses in barrels from the State of Louisiana; all of which said manufactured articles were sold by the relators in the barrels, kegs, bales, and boxes in which they were imported, the sales whereof amounting in the whole to one hundred and forty-one thousand and three hundred and five dollars; that they have made returns of their said sales to the tax collector, who insists upon the payment of the tax thereon, pursuant to the provisions of the Act of the Legislature; the provisions of which Act the relators however insist are null and void, the same being repugnant to that clause of the 4th section of the first article of the Constitution of the United States, which declares that, "No State shall, without the consent of Congress, lay any impost or duties upon imports or exports, except what may be absolutely necessary for executing its inspection laws;

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and the net produce of all duties and imposts laid by any State on imports and exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision of Congress."

The Act in question having received the deliberate sanction of both branches of the Legislature, and ratified with all the formalities prescribed by the Constitution of the State, its several provisions must be held to be valid and binding, unless they be clearly repugnant to the Constitution of the United States, or to some law passed by the Federal Legislature, pursuant to some of its enumerated powers.

The grounds upon which the relators rest their objections to the constitutionality of the provisions of the said Act, may be thus stated :

1. That the tax in question is repugnant to that clause in the Constitution which empowers Congress to regulate commerce with foreign nations, and among the several States.

2. That the said tax virtually amounts to an impost or duty upon imports, within the prohibitory clause in the Constitution referred to; and that the clause in question extends as well to commodities imported from one State into another, as it does to those that are strictly foreign.

3. That under these several constitutional provisions, all imports, internal or domestic, as well as external or foreign, are under the protection of the Federal power, and are exempt from the taxing power of the States, so long as the commodity remains in the hands of the importer in bulk, and to a sale made by him while it retains its distinctive character of an import; and in support of these positions, they mainly rely upon the principles adjudged by the Federal Judiciary, in the case of *Brown vs. The State of Maryland*, 12 Wheat. 419.

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In that case, the Legislature of Maryland had passed an Act requiring all importers of dry goods, wares, or merchandise, &c., and other persons selling the same, by wholesale, bale, or package, &c., before they sold the same to take out a license, for which they were required to pay fifty dollars; and for neglect or refusal to do so, the party offending was subjected to a forfeiture of the amount of the license tax and a fine of one hundred dollars, to be recovered by indictment.

Under this Act, the plaintiffs in error were indicted for selling a bale of dry goods without a license to do so; they demurred to the indictment, upon which judgment was rendered against them in the State Court; from which judgment the case was carried up by writ of error to the Supreme Court of the United States. A majority of the Court adjudged the law of Maryland to be null and void, on the ground of its repugnancy to that provision in the Constitution which prohibits the States from laying an impost or duty upon imports; likewise to that other provision which empowers Congress to regulate commerce with foreign nations, and among the several States.

In the opinion of Chief Justice Marshall, through whom the voice of the majority was announced, the following points were ruled:

1st. That a duty on foreign imports, is not merely a duty on the act of importation, but is a duty on the article imported.

2nd. That Congress has a right, not only to authorize importations, but the right to authorize the importer to sell.

3rd. That a commodity imported from a foreign jurisdiction, is exempt from the taxing power of the States, so long as it remains in the hands of the importer in the form in which it was imported; and to a sale by him while it remains

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in such form; and any penalty inflicted on the importer for selling in his character of importer, or any tax on the article imported, or on its sale by the importer, are alike hostile to the power conferred on Congress to regulate commerce with foreign nations.

4th. That this exemption from the taxing power of the States, continues only so long as the commodity retains its distinctive character of an import; but that so soon as this condition of things is changed by the act of the importer, either by a sale of the commodity, or by breaking up his packages, or otherwise mixing it up with the general property of the State, it immediately becomes subject to the taxing power and police regulations of the State, in the same manner, and to the same extent, to which all the property within its jurisdiction is subject.

Although this decision has not entirely escaped judicial criticism, it has nevertheless ranked, for the last quarter of a century, as the leading authority on this branch of constitutional law; and defines with almost mathematical exactness, the boundary line between the commercial power of the Federal Government and the municipal power of the States, over foreign imports, under the Constitution.

As the case of *Brown vs. Maryland* was a case of foreign commerce, subject in all respects to the laws of Congress regulating the same, pursuant to its constitutional powers: and the present case is one arising out of commerce among the States, for the regulation of which the legislative power of Congress has never been exercised: the first question I propose to consider, is, whether the power to regulate commerce, both foreign and among the States, the latter especially, is exclusively vested in Congress by the Constitution, so as to exclude all State legislation over these subjects.

In the 2nd volume of Story's Commentaries on the Constitution, at section 1063, the following doctrine is broadly

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laid down: "The next enquiry is, whether the power to regulate commerce is exclusive of the same power in the States, or is concurrent with it. It has been settled upon the most solemn deliberation, that the power is exclusive in the government of the United States." And in support of this doctrine, he relies upon the cases of *Brown vs. Maryland*, *supra*, and *Gibbons vs. Ogden*, 9 Wheat. 1. It is matter of no little surprise, that so eminent a jurist as was the late Mr. Justice Story, himself too a member of the Supreme Court at the time these cases were decided, should have relied upon them as judicial authority for the principle thus broadly and unqualifiedly asserted; when it is palpable on the most superficial examination of them, that in neither of them did the question of the exclusiveness of the commercial power of the Federal Government, under the Constitution, arise. It is true, that in both of these cases, much will be found to have been said on that subject in the arguments of counsel; and not a little, too, to the same effect, in the opinions of the Judges; but in *Brown vs. Maryland*, as we have seen, the case was one of foreign commerce already regulated by the laws of Congress, so that the sole question there was, the extent of the power of Congress, by virtue of such regulations, to protect foreign imports from State taxation: while in *Gibbons vs. Ogden*, which was a case in which the constitutionality of the exclusive license laws of New York was drawn into controversy, the only question was, whether the said license laws came in conflict with the laws passed by Congress on the same subject. In fact, in the last mentioned case, so far from that question having been decided by the Court, we have the authority of the Chief Justice, by whom its opinion was pronounced, for saying, that its consideration was expressly waived. At page 200, he says, "In dismissing the question whether the power is still in the States, in the case under consideration, we may dismiss from it the enquiry whether it is surrendered by the mere grant to Congress, or

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is retained until Congress shall exercise the power. We may dismiss that enquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it."

We thus see, that the question, whether the mere grant of power to Congress, to regulate commerce with foreign nations, and among the States, amounts of itself to an extinguishment of the power of the States to make valid commercial regulations, instead of having been settled upon solemn deliberation, by the cases relied upon by Mr. Justice Story, remained an open question for several years after their decision. It at length however came up, for the first time, for adjudication before the same tribunal in the case of *Wilson vs. The Blackbird Creek Co.*, 2 Peters, 259.

In that case, the State of Delaware had granted a charter to the Company to erect a dam across the Blackbird Creek; the dam was constructed, and the plaintiff in error, being unable to pass it with his vessel, broke it, and the Company sued him for damages—to which he set up the defence, that the creek was a navigable highway, and that he did no more damage than was necessary to allow his vessel to pass. In delivering the opinion of the Court, Marshall, Chief Justice, said, "The repugnancy of the law of Delaware to the Constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States: a power which has not been exercised by Congress so as to affect the question. We do not think that the Act empowering the Blackbird Creek Company to place a dam across the creek, can under all the circumstances of the case, be considered repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

But the case in which the question came more directly up

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for consideration before the same tribunal, was the case of *Peirce, et al., vs. The State of New Hampshire*, reported, along with two other cases, under the title of the license cases, in 5 Howard, 504. In that case, the plaintiffs in error had purchased a barrel of gin in Boston, Massachusetts, which was carried coastwise by water to Dover in New Hampshire, where it was sold in the same barrel or cask, in which it was imported, without obtaining a license for that purpose, pursuant to a Statute of New Hampshire, which prohibited the sale of distilled spirits without a license from the Selectmen of the town in which the party resided. Under this statute, the plaintiffs in error were indicted and convicted in the State Court, and the cause was carried up by writ of error to the Supreme Court.

In the argument of the case, similar grounds of objection were taken, in behalf of the plaintiffs in error, to the constitutionality of the law of New Hampshire, that were taken to the law of Maryland in *Brown's* case:—While on the other hand, it was urged, that the power of Congress to regulate commerce was not exclusive, and did not of itself amount to a prohibition upon the States, so as to render void all State legislation on that subject. The Judges delivered their opinions *seriatim*. TANEY, *Chief Justice*, at p. 578, says: "The question brought up for decision is, whether a State is prohibited by the Constitution from making any regulations of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience, or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress, is of itself a prohibition to the States, and renders all laws upon the subject null and void. This is the question upon which this case turns; and I do not see how it can be decided upon any other ground, provided we adopt the line of division between foreign and domestic commerce, marked out by the Court in

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the case of *Brown vs. Maryland.*" After reviewing the case of *Gibbons vs. Ogden*, which was supposed to countenance the doctrine, that the power to regulate commerce was exclusively vested in Congress, and showing very conclusively, that if any thing, it rather favored the opposite doctrine, he concludes, as follows: "Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For although the gin sold was an import from another State, and Congress have clearly the power to regulate said importations, under the grant of power to regulate commerce among the several States; yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the States as soon as it is landed in its territories; and a tax imposed upon it, or a license required, or the sale of it altogether prohibited, according to the policy which the State may suppose to be to its interests, or duty to pursue."

CATRON, *Justice*, said: "The power to regulate commerce among the States may be exercised by Congress at pleasure, and the States cut off from regulating the same commerce at the same time it stands regulated by Congress; but that until such regulation is made, the States may exercise the power within their respective limits." Three of their associates, namely, Justices Nelson, Daniel, and Woodbury, substantially concurred in sustaining the above doctrine—these five constituting a majority of the Court. Mr. Justice McLean appears to have rested his opinion partly on the ground, that the principle ruled in *Brown vs. Maryland*, applied exclusively to foreign commerce; and partly on the ground, that the license law was a mere police regulation, and in the exercise of an undoubted power in the State. While Mr. Justice Grier rested his opinion solely upon the ground, that the law was a purely police regulation, and not at all affected by the constitutional objection. It is undoubtedly competent for a State, in virtue of its police, or reserved powers—the right of self-preservation—to exclude from its territorial limits any thing

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which has a tendency to endanger the public health, or morals. It is to this high conservative power as Mr. Justice Grier properly remarks, that quarantine laws trace their origin; and to the supremacy of which, even constitutional obligations are compelled to give way. But it is far from being clear, that the license law of New Hampshire has any claim to rest upon such a basis, and to rank ardent spirits, an admitted article of commerce, in the same category with the causes which produce moral and physical pestilence—much less has she a right to invoke the aid of this high conservative power—not to exclude from her borders this pestilential commodity, but to sustain her in legalizing its traffic. The right to traffic in a licensed pestilence, can hardly be ranked among the reserved powers of a State.

But the fallacy in the argument, which claims to rescue the license law of New Hampshire from the charge of repugnancy to the Constitution, by intrenching it behind her police powers, is completely exposed when subjected to the following test. Suppose, for example, that the commodity, instead of a barrel of gin manufactured in Massachusetts, and imported from that State, had been a barrel of gin manufactured in Holland, and imported from that country? Where, it may be asked, would have existed the distinction between such foreign import, and the case of *Brown*, who imported and sold a bale of dry goods in defiance of the license law of Maryland; and how, it may again be asked, would the license law of New Hampshire, her police powers to the contrary, have escaped the charge of repugnancy to the Constitution, and the fate that befel the law of Maryland under the rule laid down in *Brown's* case.

It is clear, then, that the validity of the New Hampshire law can, with no show of reason, be made to rest upon its police powers; but that the ground upon which it was placed by the majority of the Court was the true ground, namely, the competency of the States to make valid commercial regu-

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lations, until the Federal Government shall see proper to make plenary exercise of its power; for it is then, and then only, that the legislation of the latter becomes, in the language of the Constitution, "*the supreme law of the land.*"

The question, then, of the concurrent power of the States to make valid commercial regulations, while the power of Congress remains in a dormant state, having been definitively settled by the Federal Judiciary in the two last cases referred to; the decision of the question involved in this case might safely be rested upon their authority; especially upon the case of *Peirce vs. New Hampshire*; for if it was competent for the legislature of that State, without infringing upon the grant of power to Congress to regulate commerce, to make a valid commercial regulation—for it was so considered by the Court—in the form of a license, operating, not merely as a direct charge, or tax, upon the import, while it remained in the hands of the importer, but as a prohibition upon its sale; it was, to say the least of it, equally competent for the legislature of South Carolina to impose a tax, which operates neither upon the importer in his character of importer, nor upon the imported article—assuming it to be an import—but which operates only upon the proceeds arising from the sale of the article, after it has been divested of its character of an import, and become a component part of the general property of the State.

There is another ground, however, upon which the decision of the New Hampshire case might also have been rested, and as it forms the chief ground upon which the Relators rely in support of their motion, I propose briefly to consider it. The position is this: that the tax in question virtually amounts to a duty upon imports, and is in direct conflict with that provision in the Constitution, which prohibits the States from "laying an impost or duty upon imports;" which provision extends to domestic as well as to foreign imports, and that the former are entitled to the same exemption from State

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taxation, that is extended to the latter under the rule adjudged in *Brown vs. Maryland*.

In support of this position, it was contended, that the term "imports," in the above clause of the Constitution, includes as well commodities that are transported from one State into another, as those that are imported from a foreign jurisdiction.

If the transportation of an article of merchandize from a port of entry in one State, to a port of entry in another; say from the port of Wilmington, in North Carolina, to the port of Charleston, in this State, be an import, within the constitutional or fiscal meaning of the term; then the conclusion is inevitable, that the transportation of a commodity across the boundary line which separates these States, at any point along its entire extent, must be equally an import.

It would be a startling proposition to affirm, that all the manufactured products which go to make up the vast amount of internal commerce that is continually carried on, among the several States and territories that compose this confederacy, by the almost infinite variety of modes of transportation now in use, are, the moment they pass the boundary line of the State, where produced, or manufactured, converted into imports, and the purchasers into importers, and entitled to the same exemption from State taxation, that is extended to foreign imports.

But, if we look to the history of the fiscal legislation of Congress, together with the judicial decisions giving construction to it, it is manifest that the term import, according to its fiscal acceptation—for it is in that sense it is used in the Constitution—is wholly inapplicable to the interchange of commodities among the States; but that it is restricted in its meaning to such commodities only as are imported from abroad, are introduced into the country through its several ports of entry, and are subject to the taxing power of the Federal Government. In *Arnold vs. The United States*, 9 Cranch, 101, it is said: "To constitute an importation,

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according to the fiscal meaning of the term, so as to attach the right of duties, it is necessary not only that there should be an arrival within the limits of the United States, but also within the limits of some port of entry." To the same effect see *Vowell vs. The United States*, 5 Cranch, 368; and 1 Mason, 499.

An article of merchandize, transported across the boundary line which separates the States of Kentucky and Tennessee, could hardly be said to come up to the above definition of "an importation."

"The word *import*," says Mr. Justice McLean, in the New Hampshire case, "in a commercial sense, means the goods, or other articles brought into the country from abroad, from another country." In speaking of the case of *Brown vs. Maryland*, he remarks: "But neither the facts nor the reasons of that case, can apply to a person who transports an article from one State to another. In some cases, the transportation is only a few feet, or rods, and generally is attended with little risk; and no duty is paid to the Federal, or State Government; and why should property which is carried across a State line be exempt from taxation, which is common to all other property in the State."

DANIEL, *Justice*, said: "Imports, in a political or fiscal, as well as in common practical acceptance, are properly commodities brought in from abroad."

It is clear, then, that to constitute an import, within the meaning of that term, as it is employed in the Constitution, three things are indispensable; first, the commodity must be brought from abroad, pursuant to the laws of Congress, regulating commerce with foreign nations. Secondly, it must be brought within the limits of some port of entry; and lastly, it must be subject to the payment of an impost, or duty, to the Federal Government, for the privilege of introducing it into the country.

It is the payment, by the importer, to the Federal Govern-

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ment, of this impost or duty, upon the imported article, which secures to it an exemption from State taxation, so long as it retains its distinctive character of an import, and forms the basis of the rule in *Brown vs. Maryland*.

But for this restraint upon the taxing power of the States over foreign imports, so long as they retain that character, it would have been perfectly competent for the State of Maryland to have imposed a tax, in any form, or to any extent, that either her interests or her policy may have dictated, the moment the commodity entered her territorial limits; and it was the distinction between foreign and domestic imports, that constituted the only real difference between the cases of *Brown vs. Maryland* and *Pierce vs. New Hampshire*, for in all other respects they were identical; the barrel of gin in *Pierce's* case being as much an import within the literal meaning of the term, as was the bale of merchandize in *Brown's* case; and but for the distinction referred to, the repugnancy of the license law of New Hampshire to the constitutional provision in question, would have been quite as palpable, as was the license law of Maryland in *Brown's* case.

In the former case, at page 601, CATRON, *Justice*, says: "Had the gin imported been an import from a foreign country, the license law prohibiting its sale would have been void; my reasons are founded on *Brown vs. Maryland*." And at page 594, McLEAN, *Justice*, says: "It is supposed that the declaration, 'that no State, without the consent of Congress, shall lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws,' refers to foreign commerce." Let it however be conceded for the argument's sake, that a domestic import stands upon the same footing with a foreign import, and that it is entitled to the same exemption from State taxation that the latter is, while it retains that character, under the rule laid down in *Brown vs. Maryland*; it is nevertheless clear, that the rule can have no application whatever to the case made

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by the Relators. The rule, as we have seen, is this: That a duty upon imports, is not a duty upon the act of importation, but upon the thing imported; and its exemption from State taxation continues only—in the language of the Court—"so long as it remains the property of the importer in his warehouse in the original form, or package, in which it is imported." And the reason why the imported commodity is thus protected from the fiscal power of the State, while it remains in this condition, is because, says the Court, "the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated, until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State." But the Court goes on to say: "This state of things is changed, if he (the importer) sells them, or otherwise mixes them with the general property of the State, by breaking up his packages, and travelling with them as an itinerant pedler." And again: "He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them."

Now if the mere breaking up of the package by the importer, he still retaining possession of the article, or a sale by him of the imported commodity, *eo instanti* divests it of its character of an import, and at the same time removes the constitutional inhibition upon the taxing power of the State; the logic which claims to hold the proceeds arising from the sale of such commodity subject to the same rule, can hardly be considered unsound, or fallacious; unless, by the way, the rule in *Brown vs. Maryland* be so construed as to extend to the proceeds of such sale, and the profits or income of the importer—an exemption that is denied to the commodities themselves, from which such proceeds and income accrue.

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Upon the whole, from the best consideration I have been able to give to the question, I am of opinion, that the tax imposed by the Act of 1854, upon the amount of sales of goods, wares, and merchandise, is clearly within the constitutional powers of the legislature; and I think I may venture the assertion, that of the many revenue Acts that have been passed by that body, since the State became a party to the federal compact, none will be found less obnoxious to the charge of repugnancy to the Constitution of the United States, or to any law passed by the federal legislature, pursuant to the powers vested in it by that instrument, than will the provisions of the Act in question.

The motion is therefore refused.

The Relators, Rhett & Robson, appealed from the decision on the grounds to wit:

1. That the tax laid by the Act of Assembly dated the 21st day of December, A. D. 1854, entitled, "An Act to raise supplies for the year commencing in October, 1854," upon the

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lature had previously given the power. There is certainly a great difference in this respect between municipal and private corporations. The former is always very much under the control (as a part of the law-making power) of the Legislature. The latter may stand upon their Charters.

If it be necessary to look to authority, the case of *Sharpless et al. vs. The Mayor, etc., of Philadelphia*, February No., 1854, Liv. Law Mag., 123, and the defendant's answer, arguments and appendix in that case, furnished to me at the hearing, will furnish an abundant supply.

Upon every consideration I am against the motion, and do, therefore, refuse the rule.

From this order the Relator appealed, on the grounds:

1. Because the Charter of the City of Charleston does not directly or impliedly confer upon the City Council the power to tax the people of Charleston for the construction of Railroads in or out of the State, and the business of constructing, or aiding in constructing, Railroads, is not one of the purposes for which the Corporation was created.

2. Because, if the power to tax the people of Charleston for the purpose of aiding in building Railroads, in or out of the State, is given by the general words—"Every other by-law or regulation that shall appear to them requisite and necessary for the security, welfare, and convenience of the said City, or for preserving peace, order and good government within the same,"—"And the said City Council shall be vested with full power and authority to make such assessments on the inhabitants of Charleston, for the safety, convenience, benefit and advantage of the said City, as shall appear to them expedient,"—it is unlimited, and more extensive than the powers which the Legislature itself can constitutionally exercise.

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3. Because a tax on the people of Charleston *alone* for the construction of works of internal improvement within the State, *but* beyond the corporate limits of the City, and which are supposed to be for the common benefit of all the people of the State, is unequal and unconstitutional, whether it be imposed by the Legislature, or by the City Council under the authority of the Legislature.

4. Because, under the general grant of legislative authority, by the first section of the first Article of the State Constitution, the Legislature has not the power to impose a tax on any one portion or class of the people of the State alone, for the common benefit of the people of the whole State—the imposition would not be taxation, but confiscation—and the more so, if the burden were imposed for the benefit of people of other States and territories.

5. Because a law imposing a tax, to be used for any general purpose, is a general law, and not a local one, and therefore not such an one as the City Council can have power to pass.

6. Because, under the Constitution of the State, the power to raise revenue by taxation, for general purposes, is vested exclusively in the Legislature, and cannot be delegated.

7. Because the third section of the Act of 1854 is unconstitutional and void, inasmuch as it was designed to call into existence contracts and obligations which were utterly null and void, and of no force when the said Act was passed, and because it violates the spirit of the third section of the ninth Article of the Constitution of the State.

8. Because, though the Legislature may forgive and confirm any Act of a Corporation which is simply contrary to the

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laws of the State, and by which it may have forfeited its charter, yet it cannot sanction or confirm the usurpation and continued exercise of powers and franchises which are inconsistent with the rights of the citizens under the Constitution of the State. Neither can it, by such confirmation, subject individual members and their property, without their consent, to the obligation of contracts made without authority, and beyond the purposes for which the Corporation was created.

Treville, for appellant. The Legislature cannot constitutionally confer on a municipal corporation unlimited power to construct Railroads in or out of the State, and to tax the people of the corporation against the consent of the minority, to pay for them. Sug. on Pow. 119; *Bradley vs. Baxter*, Amer. L. Reg., Sept. 1853, p. 658; *Plank Road Company vs. Husted*, Amer. L. Reg., Feb. 1856, p. 213; *People vs. Collins*, Amer. L. Reg., Aug. 1854, p. 591; 2 Story Com. 343, 367, 428; *Sharpless vs. Mayor of Philadelphia*, 9 Har. 147; 2 Kent, 381; *Burney vs. Tax Collector*, 2 Bail. 654; Amer. L. Reg., Dec. 1853, p. 85; Amer. L. Reg., Nov. 1853, p. 27; Id. 1; *Leland vs. Thomas*, 24 Wend. 65; *Brown vs. County Commissioner*, Amer. L. Reg., May, 1853, p. 437; Liv. L. Mag., Jan'y, 1854, p. 28; Amer. L. Reg., Sept., 1856, p. 702; 1 Sum. C. C. R. 46. Putting aside the constitutional objection, the Charter or Act of 1783 does not confer on the City Council the power or authority to construct Railroads, or to purchase Railroad stocks, and to tax the people of the corporation to pay for them. 2 Kent, 289, 299; *Dartmouth College vs. Woodward*, 4 Wheat. 518; Ang. & A. on Corp. 84, 85, 86; 2 Cranch, 427; Ang. & A. on Corp. 283, 245, 278; 1 Mill, 234; *Bangs vs. Snow*, 1 Mass. R. 181; *Stetson vs. Kempton*, 13 Mass. R. 272; *People vs. Utica Ins. Comp.*, 15 Johns. R. 3, 58; *Beatty vs. Lessee of Knowler*, 4 Peter, 152; *Beatty vs. Mar. Ins. Company*, 2 Johns. R. 109; 2 Story Com. 366, 382, 383, 388, 389; *Telfair vs. Howe*, 3 Rich. Eq. 235; 7 Wend. 412;

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Ang. & A. on Corp. 202; *Blackstone Canal Company vs. Far-
num*, 1 Sum. C. C. R. 46; 2 Story, Com. 360; 2 Kent, 274,
275; Amer. L. Reg., Nov. 1853, p. 32; Amer. L. Reg., Dec'r,
1853, p. 107. All subscriptions by Council to Railroads, in
and out of the State, are void, and all bonds, &c., given for
money borrowed to pay subscriptions, are void. *Broughton
vs. Manchester Water Works*, 5 Cond. Eng. C. L. R. 216; *Pow-
ell vs. Breek*, 4 Strob. 427; Ang. & A. on Corp. 193, 200;
Amer. L. Reg., October, 1856, p. 721; 13 Con. R. 249; 3
Story Com. 260; Story on Ag. 388, 307; *Lee vs. Munro*, 7
Cranch, 366; *Durham vs. Trustees of Rochester*, 5 Cow. 465;
1 Eng. C. L. R. 792. The Act of 1854 is void, because retro-
active, unconstitutional, not being a law, but an order or judg-
ment, a judicial act. *Lowden vs. Moses*, 3 McC. R. 93; *Dash
vs. Vanklect*, 7 Johns. R. 477; *Hampshire vs. Franklin*, 16
May R. 75; *Medford vs. Larned*, 16 May R. 215; *Foster vs.
Essex Bank*, 16 May, 244; *Blackledge vs. Ogden*, 2 Cranch,
270; *King vs. Dedham Bank*, 15 Mass. R. 447; *Magwood vs.
Dugan*, 1 Hill, 182; *Bull vs. Calder*, 3 Dal. 386; Amer. L.
Reg., Nov. 1853, p. 380; 9 Har. R. 147; *Satterbee vs. Mathe-
son*, 2 Peter, 380; Con. So. Ca., Art. 1, § 1, Art. 3, § 1; *Dash
vs. Vanklect*, 7 Johns. R. 477; 9 Har. R. 147; Amer. L. Reg.,
Nov. 1853, p. 103.

Porter, City Attorney, contra, cited Wilc. on Mun. Corp.
Intro. 17; *New River Water Case*, 11 Co. 73; *Wilkinson vs.
Leland*, 2 Peters, 653; *Satterlee vs. Matheson*, 2 Peters, 413;
Wilc. on Mun. Corp. § 266, 12, 10; *Godin vs. Crump*, 8 Leigh,
120; 15 Conn. R. 475; *Nickolls vs. Nashville*, 9 Hump. 252;
Talbot vs. Dent, 9 Monro, 526; 20 Ohio, 609, 625.

The opinion of the Court was delivered by

O'NEALL, J. The Court of Errors, having unanimously
concurred in the ruling below, have instructed me to deliver

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the opinion. I have had the benefit of twice hearing the able argument of the attorney for the Relator; but I have never seen cause to hesitate about the judgment, which I formed on the Circuit. Rather than delay the opinion, I have thought it was better briefly to assign the reasons of our judgment. A review of the learned argument of the Relator's attorney would be to write a book on this subject. The work of elaboration and expansion, after twenty-eight years service on the Bench, may well be left to younger and more ambitious men. A right decision is more to be desired than many reasons. It is often, that in the multitude of words error is found. There was an old aphorism that wisdom was shown by few words: and beyond all doubt, if there is any thing which is becoming a more serious evil than any other both in making and expounding laws, it is that too much is said.

So much by way of excuse for not undertaking the immense labor of reviewing the able argument of the Relator's attorney.

The positions, which he assumed were, 1st, That the legislature could not constitutionally confer the power exercised by the respondents. This he supposed to be the power to construct Railroads, in or out of the State, and to tax the people of the city to pay for them. But I do not so understand the power exercised. I regard it as the mere investment of the funds of the corporation in stocks. They (the corporation) subscribe so much to the stock of a Railroad Company. What is that but buying so much stock in it. If the corporation had an excess of funds and could pay each instalment without taxation, no one would doubt their power thus to dispose of their surplus funds. What is the difference between that case and borrowing money by the sale of their own bonds to pay for the stocks? It may not be wise thus to go into debt, but I do not perceive how the Mayor and

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Aldermen are to be checked, in the exercise of this power, save by the ballot-box.

I know no restrictions on legislative power, which in this State is vested by the Constitution in the General Assembly, except those which deny certain powers, or which by implication arise because certain powers are conferred on Congress. So far as legislative power is concerned, I agree, that subject to the restrictions, which I have suggested, the General Assembly have all the powers of the Parliament of Great Britain. But I do not believe that the judicial or executive powers belong at all to the legislature. The Constitution has wisely placed these in different hands. That the General Assembly have all the powers, which the respondents have exercised in their corporation in and for the whole State, I have no doubt. If they (the General Assembly) thought proper, they could build a railroad, with just as much propriety as a *Granite State House*. Both might lead to an extravagant waste of money, but still the power can not be questioned. They have dug canals, and built roads, and I have no doubt they will do so again. They have subscribed to railroads in and without the State, and it is very possible, they may do so again. For all these purposes, they have directed bonds to be issued and sold, and for their payment have taxed the property of the State. The powers of the General Assembly in all these respects seem to me to be undoubted, and if so, why may they not clothe a municipal corporation with the same powers to be exercised for the benefit of the people of their charge? It seems to me to be clear they can.

2d. If so, the next question is, did the legislature in the charter of the city use words sufficiently large to cover the power exercised by the City Council of subscribing to railroads, issuing bonds to be sold for the purpose of paying for the same, and then taxing their corporation for the final payment of the bonds thus issued and sold. After

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specific powers are given, the Council are authorized to make every "other by-law or regulation that shall appear to them requisite and necessary for the security, *welfare and conveniency of the said city* or for preserving peace, order and good government for the same."

It is true that railroads were not in 1788, even thought about, but because the subject of action is new, it by no means follows, it may not be within the words conferring the power. A penitentiary did not exist at the formation of our Constitution, yet who doubts, that the General Assembly may establish one.

The only enquiry legitimate and proper is whether a subscription to a railroad in the State or without the State may not be necessary for the "*welfare or conveniency of the city?*" Who is to decide that question. The Court? Certainly not. It is by the words of the charter left to the City Council. But let us examine the matter slightly. Charleston in 1788 was looked to as a commercial city. She had realized the importance of commerce in a very striking degree between 1776 and 1788. Before war in reality brooded over her very hearth stones, from 1776 to 1780, her merchants became indeed princes, but from the fall of the city in May 1780 to 1788, she became a garrison town, and saw wealth and commercial enterprise take to themselves wings and flee away. It was therefore of great importance to promote the means and channels of commerce. *That* from that day to this has been a prime consideration. Why was the Hamburg Railroad conceived and begun? Was it not to promote the commerce and convenience of the city? Why was the Louisville, Cincinnati, and Charleston Railroad projected? Was it not to connect the queen cities of the west and south? Why have all the railroads, in the State and out of the State, to which Charleston has contributed, been built? Certainly presently or remotely to benefit Charleston. Have they not answered the ends intended? I have no hesitation in saying

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that though it is probable, there have been instances in which little has been done, where much was expected, for the benefit of the city, that yet in the main they have contributed much to the "*welfare and conveniency*" of the city. Go back to the period when the Charleston and Hamburg Road was contemplated; when its noble founders Black, Aiken, and others, calculated its income, as a paying concern from the daily travel of five or six passengers in the mail coaches of that time, and compare it with its present annual income of more than a million and a half, and ask has it not contributed to the "*welfare and conveniency*" of the city? How has it been enabled to do this? Is it not by its connection with the roads within and without the State which have been helped to be built by the generous contributions of the city? So it seems to me. Considered in this way, I have therefore no doubt about the powers exercised. But really there is no necessity for such an argument. What is a corporation? It is an artificial person, capable not only of exercising given powers, but also of owning real and personal property. Suppose the city of Charleston was as fortunate as Augusta; and had like her a large fund derived from a very productive piece of property, might not her City Council invest this fund in the purchase of stocks, or in subscribing to a Railroad? I see nothing to prevent such a course. Why not, in the absence of funds, become the owner of railroad stocks by borrowing money, making and selling bonds, and trusting to the fortunate result of the investments to pay for them, or, that expectation failing, to charge the payment on the future means of the city. I am unable to see anything to restrain the city authorities in this respect, but public opinion, indicated by the ballot-box. The taxing power given by the charter "to make such assessments on the inhabitants of Charleston, or those, who hold taxable property within the same, for the *safety, convenience, benefit and advantage of the said city, as shall appear to them expedient,*" is ample. They

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can make just such assessments as may in their judgment be necessary. I do not perceive any thing which can help the Relator, Copes, from paying, as long as he may own property within the city, its due proportion of the city debt in the shape of assessments.

8d. But if the power of the City Council was doubtful, by the Act of 1854 the General Assembly have confirmed the action of the City Council. That is to my mind a conclusive answer to all which has been said. The proceeding by *quo warranto* is a remedy, in the name of the State, for the exercises of a power on the part of a corporation, which has not been granted to it, and thereby the charter may be forfeited. The State, however, before the proceeding by *quo warranto* says, if you had not the authority, we now confirm all which you have done. This relates back, and by confirming, necessarily gives the challenged power, at the time it was exercised. How can she afterwards ask, *by what warrant did you exercise the power?* She is estopped, and of course the Relator.

But it is contended, this was also an unconstitutional Act. It has been well asked, by what provision of the Constitution? None can be found. The whole argument is by mistake. This is not charging Mr. Copes with a debt. It is not infringing upon any of his rights. It was exclusively a matter between the State and the city. Each represented by their constituted authorities have concurred in the Act of 1854, and there is an end of the whole matter.

The motion is dismissed.

JOHNSTON, DUNKIN, DARGAN and WARDLAW, CC., and WITHERS and WHITNER, JJ., concurred.

MUNRO, J., having been of counsel gave no opinion.

Motion dismissed.

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W. B. NOBLE *vs.* A. P. BURNETT & OTHERS.W. H. DAWSON *vs.* ELIZABETH CORBETT.

Upon a question of probate, *held*, that an executor is a competent witness to attest a mixed will—the Court thinking that he is also competent to attest a will of personalty only.

An executor takes in this State a beneficial interest under the will, and that interest is taken away by the statute 25 Geo. 2, ~~ch. 25~~ c. 6.

The question, whether the office of executor, as well as his commissions, is taken away by the statute, not decided.

John B. Bull, late of Abbeville, on the 8th April, 1843, executed an instrument, purporting and declared to be, his last will and testament. By the first disposing clause, or “item,” he devised to his wife, Sarah Bull, his tract of land lying on Little River, and containing about five hundred and seventy acres. By the second *item*, he bequeathed to her his good and aged servant Doll, and all her descendants, with the husbands of her daughters; also, all his negroes, fourteen in number, on his farm at Little River. By the third *item*, he bequeathed to his wife all his stock on his farm at Little River, horses, cattle, sheep and hogs; all the plantation tools, all his household furniture on both plantations, his large edition of Scott’s Commentaries of the Holy Bible, and all his religious books: he requested his wife to collect all the articles of jewelry to be found in his house—to have them sold and the proceeds given to the American Tract Society; he declared, that he wished it understood, settled, and known in law, that the property which he had given to his wife, he so secured unto her that no person or persons, under any circumstances whatever, should be able to deprive her of any part of it during her natural life; and at her death that it should be her

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privilege to dispose of it as she might think best. As to the estate derived from his deceased brother, William A. Bull, he, by the same *item* (the third) directed his executors, that, should his decease occur before the close of the year, (1843,) the plantation be kept up until the close of the year, and his family permitted to reside thereon; that, out of the crops of 1842 and 1843, all his debts be paid, money be furnished to complete the collegiate course of James Morrow, Jr., and the sum of three hundred and forty dollars be handed to his wife; that, so soon as his debts could be paid, his executors proceed to make arrangements for selling the whole estate for cash, or on limited credit; that, as soon as the money could be collected, the sum of five thousand dollars be placed at interest for the benefit of James Morrow, Jr., and the remainder divided into four parts, one of which he bequeathed to the American Tract Society, one to the American Bible Society, one to the Presbyterian Board of Publication, &c., and one to the Theological Seminary at Columbia. And, lastly, after expressing his earnest desire that there should be no litigation or contention concerning his affairs, after his decease, or even dissatisfaction in any way, he nominated and appointed William P. Noble, Paul Rogers and Edmund C. Martin to be the executors of his said last will and testament, solemnly requesting them faithfully to discharge their trust, and repeating his injunction to avoid all litigation. To this instrument William H. Davis, J. L. Bouchillon, Sen., and Edmund C. Martin, nominated as executor, were the three subscribing witnesses.

The ordinary of Abbeville having, upon the application of William P. Noble, refused to admit this instrument to probate in solemn form of law, as the last will and testament of John B. Bull, on the ground that Edmund C. Martin was incompetent to attest it, an appeal was taken to the Court of Common Pleas. Sarah Bull, a party defendant, pleaded specially to the suggestion of the appellant, and submitted that Edmund

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C. Martin was incompetent as to the whole will, but that he was competent to attest so much of the instrument as contained devises and the specific bequests to herself; that so much of the instrument, therefore, should be admitted to probate, and all other parts rejected. The trial was had before his Honor, Judge Whitner, at Fall Term, 1856. William H. Davis and J. L. Bouchillon, Sen., were examined and proved the execution of the will by the testator, and its due and proper attestation by the three subscribing witnesses. Edmund C. Martin, who had never intermeddled and who had renounced the executorship before the trial before the ordinary, was offered as a witness in support of the will. On objection made, his Honor felt constrained to rule, on the authority of *Taylor vs. Taylor*, (1 Rich. 581,) that he was incompetent to attest the will or any part of it. He also held that he could not be examined as a witness.

The jury, under his Honor's instructions, rendered a general verdict against the will.

W. P. Noble appealed and moved for a new trial, on the grounds,

1. Because his Honor held Edmund C. Martin, an incompetent attesting witness to the will, and refused to allow him to be sworn in the case.

2. Because his Honor directed the jury to find against the will, a general verdict, whereas it is respectfully submitted, the finding should have been confined to the issue made, and according to the facts of the case.

Sarah Bull also appealed and moved for a new trial, on the grounds,

1. Because his Honor held E. C. Martin an incompetent

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witness to prove specific bequests, and rejected him when sworn upon his *voire dire*, without examination.

2. Because his Honor held, that a general verdict for or against the will, could only be rendered upon the pleadings presented.

3. Because his Honor held, that no verdict, or finding, could be rendered upon the specifications of the suggestion severally, and refused the said Sarah B. Bull permission to submit the specifications to the jury upon motion made for such purpose.

4. Because the finding was rendered upon the single fact, that E. C. Martin was incompetent as an attesting witness, being nominated an executor, and that the finding should have been limited to the specification charging such defect.

5. Because the verdict, being general, extends to and covers specifications respecting which no proof was offered.

John H. Corbett, late of Charleston, executed an instrument, purporting to be his last will and testament, and to contain devises and bequests of real and personal estate, to his sister, absolutely, to his nephew, absolutely, and to his niece Elizabeth, for life, with remainder to her issue, should she have any, and, if not, then to his nephew. Seven persons were nominated as executors, and also as trustees of the share left to Elizabeth. Wm. H. Dawson and Amilius Irving were two of the persons nominated as executors, and they, with another, were the subscribing witnesses. This instrument bore date the 10th August, 1850, and was republished by a codicil bearing date the 9th September, in the same year. The subscribing witnesses to the codicil were the same as to the will.

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These instruments were proved in common form on the 15th May, 1855, and Richard C. Laurens qualified as executor. He shortly afterwards died, and on the 3d December, 1855, Wm. H. Dawson qualified as executor. Being required to prove the instruments in solemn form of law, his application for that purpose was heard in March, 1856, by the Ordinary for Charleston. The instruments were impeached upon the ground of Wm. H. Dawson's incompetency as an attesting witness, and it was further objected that he could not be sworn and examined at the trial, not only because of his nomination as executor, but because he had qualified as such, and was a party to the record. The ordinary felt constrained upon the authority of *Taylor vs. Taylor*, and other decisions in this State, to sustain the objections to the competency of Wm. H. Dawson, and to refuse to admit the instruments to probate.

An appeal from the decision of the Ordinary was heard at Spring Term, 1856, before his Honor Judge O'Neill, who pronounced judgment as follows :

PER CURIAM. I agree with the Ordinary in his legal conclusion, that the executor is incompetent as a witness to prove the will. Beyond all doubt, it was the very point decided in *Taylor vs. Taylor*, 1 Rich. 531, and that too upon a mixed will. I confess that I do not perceive any distinction in a question of probate between a will covering both real and personal estate, and a will of personalty alone. So far as the Probate Court (the Ordinary) is concerned, it is alone as a will of personalty that that Court has any jurisdiction. The probate there, in common and solemn form, cannot affect the real estate.

The same result must follow from a verdict here on an appeal from the Ordinary. For although the case is here tried as a new issue, and all persons in interest are parties, the effect of this verdict is merely to compel the Ordinary to set aside the will, or admit it to probate in solemn form of law.

I stated, in *Workman vs. Dominick*, the reasons why I

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thought in that case, an executor, who had refused to prove the will, was a competent witness to prove even a testament. He never had—never could have an interest; he was not—and could not be a party in the case. How a witness, thus situated, could be ruled to be incompetent, is to me as incomprehensible as the absurd proposition, that something can be made out of nothing.

Cannon vs. Setzler, 6 Rich. 471, decided that a legatee, who was a witness to a will of real and personal estate, did not fall under the rule of exclusion in *Taylor vs. Taylor*, and that by the forfeiture of his legacy under the Statute of George 2, he was competent to prove the will. It is enough to say that *that* case does not reach the point *here*, and of course cannot control my judgment.

I have no idea that the Statute of George II. ever was, or ever can be, construed to forfeit an executorship. It would be strange indeed, that he who was to execute a will, who was in the place of the testator, who became thereby the owner of all his personal estate, should, by a forced construction of words, be held to forfeit it, and thus set up the will.

I understand a large estate may depend upon this question, and may be the subject of discussion at Columbia in May next. I shall, therefore, refrain from any further remark at present. This case may there also be heard, if the parties choose.

The Ordinary's decree on this point is affirmed, and the appeal is dismissed.

Wm. H. Dawson appealed, on the ground, that he was a competent witness to prove the will, and should have been admitted for that purpose.

The cases were argued in the Law Court of Appeals at Columbia, May Term, 1856, by *Noble* and *Memminger*, for the executors, by *McCrady*, for the charities, by *Thomson*, for

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Sarah Bull, and by *Burt* and *McGowan*, for the next of kin. That Court ordered the cases to this Court where they were now heard.

Noble, for appellant.

1. An executor who is an attesting witness to a will, has a beneficial interest in it; the statute 25 Geo. 2, embraces him as well as a legatee, removes his interest, and renders him competent. 2 Statutes at Large, 580; 5 Id. 106; 3 Id. 668; 6 Id. 238; Statute of Frauds; *Hilliard vs. Jennings*, 1 L. Raym. 505; *Ansty vs. Dowsing*, 2 Strange, 1253; *Wyndham vs. Chetwynd*, 1 Burr, 414; *Hindson vs. Kersey*, 4 Burns' Eccl. Law, 88, 97; *Powell on Devises*, 134; *Roberts on Wills*, 162; 1 Jarman, 65; *Bettison vs. Bromly*, 12 East, 250; *Hatfield vs. Thorp*, 5 Barn. & Ald. 589; *Taylor vs. Taylor*, 1 Rich. 549; *Henderson vs. Kenner*, 1 Rich. 476; *Workman vs. Dominick*, 3 Strob. 591; *Tucker vs. Tucker*, 5 Iredell, 168; *Cannon vs. Setzler*, 6 Rich. 472.

2. If 25 Geo. 2, does not embrace an executor, that is, if an executor has no interest in the will, it follows that, at the time of attestation, he was competent on principles of the common law. 1 Greenl. Ev. 455; *Phipps vs. Pitcher*, 6 Taunt. 219; *Sears vs. Dillingham*, 12 Mass. 358; *Snyder vs. Bull*, 17 Penn. Rep. 54; *Rucker vs. Lambdin*, 12 S. & M. 254; *Coulter, Ex'r*, vs. *Bryon and Wife*, 1 Gratton, 87; *McDonald's will*, 2 J. J. Marsh. 332; *Durant vs. Ashmore*, 2 Rich. 191; *Filson vs. Filson*, 3 Strob. 292; *Peoples vs. Stephens*, 8 Rich. 198; 3 Statutes at Large, 668.

Thompson, for Mrs. Bull.

R. B. Rhett, for next of kin.

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The will of John Bull, like Taylor's will, is a mixed will; and the realty is made personalty by the case of *Wilkins vs. Taylor*, the realty being ordered by the will to be sold and to be converted into personalty. The devise of land to Mrs. Bull is void, on account of her alienage. The will, therefore, is a will of personalty.

To make a will is a privilege. 2 Blackstone, 49, statute Hen. 8, c. 1; Act of 1789, P. L. p. 106. Those who claim the privilege must show that they conform to its conditions. The privilege was abused in England,—hence the Statute of Frauds, which provides that every will of lands shall be attested by three credible witnesses. The judges, in carrying out this statute, enforced the common law principle as to credibility, that no one can prove a paper in which he is interested. The opposing counsel admit these positions, but maintain, 1st, that the statute of Geo. 2 applies to all wills in this State, and to an executor, *whose interest* it takes away and makes him a competent witness; and, 2d, that the executor has *no interest* in the will, but a contingent office, which ought not to affect his testimony. To these positions we answer:

1. The statute of Geo. 2 is applicable only to wills of lands, as the preamble, and all the adjudications in England, clearly show.

2. It is not applicable to executors or devisees in trust. *Betteson vs. Bromley*, 12 East, 254, decided in 1810; *Lowe vs. Tolliff*, 1 Blak. Rep. 365; *Fowler vs. Welford*, 1 Doug. 139.

3. The statute of Geo. 2 is applicable only to interests arising directly by or out of the will, and does not embrace a consequential interest, like that of an executor, whose interest in commissions has been created by a law of South Carolina, passed some thirty years after the enactment of the statute of Geo. 2 in England. 1 Jarm. on Wills, 106; *Hat-*

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field vs. Thorp, 5 B. & Ald. 589, decided as late as 1821. The statute speaks of interests which are "thereby *given or made*" by the will. An executor's commissions are not "*given or made*" by the will. The statute could not have had reference to such an interest, because executors in England, neither then nor now, are entitled to any commissions. That they were not included at all by its provisions is clear, from the fact that but a few years since, the statute of 1 Victoria, c. 27, sec. 17, made an executor a witness, by enacting, that "no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof." Here is a clear legislative construction by Parliament, that the statute of Geo. 2 did not apply to executors. When South Carolina follows the example of England, and passes a law like that of 1 Victoria, it will be time enough to contend that an executor can be a witness to a will by which he takes a vast interest as legal proprietor, and the recipient of commissions. If an executor, in England, took such interests, it is extremely doubtful whether the statute of Victoria 1 would have passed. He takes, in England, no commissions, and the office, excepting when there is a residuum, which very seldom occurs, is merely a burdensome office.

Our own decisions have also settled the case. *Cannon vs. Setzler* has no application to this case. The interest was a legacy—an interest directly created by the will—and the statute of Geo. 2 may well be considered as applicable to all interests "*given or made*" by the will. *Taylor vs. Taylor*, decided in this court, is the present case. It was a will of valuable real, as well as personal estate, and this feature is distinctly exposed on the face of the will, and in the arguments and decision of the court. The will was set aside on the ground that an executor was an incompetent witness to it, and the whole estate went under administration. *Taylor vs. Taylor*, is followed and supported by repeated decisions by this

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court. *Henderson vs. Kenner*, 1 Rich. 474; *Workman vs. Dominick*, 3 Strob. 590. In *Workman vs. Dominick*, the will was declared void, because the executor was an attesting witness. The Court of Chancery, sitting as a Court of Appeals, supported these decisions in *Wilkins vs. Taylor*, and *Douglas vs. Brice*, 4 Rich. E. 323. If there is any law of the land, John Bull died intestate, at least so far as his personal property is concerned. It belongs to the next of kin, by the solemn and reiterated decisions of this Court itself.

It is argued, that the statutes regulating the attestation of wills should be construed in "pari materia." The laws with respect to real and personal property, establish two different systems, totally diverse in their regulations. On this very point of attesting wills, since the Statute of Frauds in the time of Charles II., near two centuries ago, three witnesses to a will of land has been required. Until 1824, no witnesses at all were required to wills of personalty. The Act of 1824 assumes the very words of the Statute of Frauds; but says not a word as to the statute of Geo. 2, which is an amendment of the statute of frauds. The inference must be, that the Legislature intended to make the Statute of Frauds, requiring three witnesses to a will, applicable to personalty; but did not intend to make its amendment, the statute of Geo. 2, of application to such wills. But suppose the Act of 1824 did "import" the statute of Geo. 2, and make it the law as respects wills of personalty, the Legislature must be presumed to have "imported" it with the construction and meaning it had in England, as shown in *Hatfield vs. Thorp*, and *Bettison vs. Bromley*. *Hatfield vs. Thorp* was decided in 1821, only three years before the Act of 1824, and settled the law in England, that the statute of Geo. 2 did not apply to any interest arising consequentially or beside the will. Having this statute in view, with its judicial construction, the Legislature could not have intended that it should apply to executors. To make it so, is sheer legislation.

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The second position of the opposing counsel, that an executor has no interest in a will, but a contingent office, is inconsistent with their first position. The executor of a will, with commissions, has not only a fiduciary, but a lucrative office. It is often more lucrative than the interests of all the legatees put together. Debts may swallow up all the legacies. Legatees may have small or no interests at all in a will. The executor is vested with the legal estate of the testator, and always must have an interest. He is not always one of the family. He is the last man who should be an attesting witness to a will in South Carolina.

McCady, for charities.

Burt, for heirs at law.

Petigru, for heirs at law.

Memminger, for executors.

The opinion of the Court was delivered by

WITHERS, J. In each of these cases, one of three persons, who subscribed in character of attesting witnesses to a will, was nominated as executor; in the former, the executor nominated never qualified, but renounced; in the latter case, the executor nominated did qualify, and has not renounced; in each case, the will was a mixed one, that is, it disposed of both real and personal estate; each has been denied probate, upon the ground, that one, nominated executor, was incompetent to attest the will that nominated him as such, and therefore, that each will was void, being subscribed by only two attesting witnesses to its execution, competent for that end in law, whereas at least three such are required to a will of any kind. Both these cases are parallel with that of *Taylor*

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and *Taylor*, 1 Rich. 531, in these particulars, to wit: that an executor has subscribed as one of three attesting witnesses, to a mixed will; and that the question is presented upon the *probate* of such will: and the only difference between them and the case of *Cannon* and *Setzler*, 6 Rich. 471, is this, that in the latter case, a legatee and not an executor, subscribed as one of the necessary number of attesting witnesses to the execution. The will in *Taylor* and *Taylor* was denied probate; that in *Cannon* and *Setzler* was admitted to probate. The difference between the present case and that of *Workman* vs. *Dominick*, 3 Strob. 589, is, that in the latter case, the will disposed of personalty alone. It was denied probate. The three cases mentioned, have been decided by the Court of Errors, and those, now to be adjudged, are before the same tribunal.

If, by virtue of one being nominated executor, in a mixed will, he takes such a beneficial interest, by or under the will, as is vacated and annulled by the statute 25 Geo. 2, c. 6; if, (in other words,) he stands upon the footing of a legatee, (so far as the action of that statute is concerned,) then the judgment, rendered in *Taylor* and *Taylor*, was erroneous, as is satisfactorily established by *Cannon* and *Setzler*; for, on such assumption, the will, in the former, ought to have been admitted to probate, as was that in the latter case.

It is further to be observed, that *Taylor* and *Taylor* proceeds upon the ground, that, though the statute of George may apply to a mixed will, yet it does not act upon a question of *probate* in the Ordinary's Court, because that proceeding affects only personalty, and is as a case in Doctor's Commons. That doctrine is overthrown by *Cannon* and *Setzler*, for the question there was one of probate merely; and it is maintained and ruled, upon reasons satisfactory, that, whenever the statute of George annuls an interest, it does the work effectually, in all forums, and upon all occasions. So there is nothing left of the *judgment* in *Taylor* and *Taylor*, unless it

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shall be held to rest on some distinction, in the case of a mixed will, between an executor and legatee, nominated in the same.

Until such modification of *Taylor* and *Taylor* we had this (most unhappy) result, that the same instrument was a will for realty, and none for personalty; that, in fact, the statute of George, when invoked in the Court of Probate, was silent, in relation to the same paper, but spoke effectually and potently, when invoked in any other Court, touching a devise; (*vide, Henderson vs. Kenner*, 1 Rich. 531; *Douglass vs. Brice*, 4 Rich. Eq. 322.)

What disastrous confusion must be introduced by such a state of the law—into the scheme of testamentary dispositions—how completely, and in how many cases the influence of advancements upon the mind of a testator, in a mixed will, and the testamentary wishes, generally, would be thwarted—it needs no illustration to show. It is fortunate, therefore, that the Court had the opportunity, presented by the case of *Cannon* and *Setzler*, to discover, that the statute of George, properly interpreted, would not work such consequences; for all will agree, that, in this State, at least, where distributees, those standing toward a decedent nearest in blood and domestic relation, are in lieu of the heir of the common law, and are, some or all, legatees and devisees in most cases, it is far better, where the whole estate, real and personal, is disposed of by will, that the whole instrument, as to its execution, should be either valid, or void entirely.

In the uncertainty, if not the confusion and conflict of judicial opinion, which is disclosed by our cases, upon the question of wills, well or ill attested, it is fit that the cases now before us should have been brought to the Court of last resort, and that the occasion should be improved to fix some rules, that may serve as guides to Bench and Bar.

The argument and the judgments to be found in those cases warrant, as well established, the following propositions:

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1. That a person, subscribing in character of attesting witness to the execution of an instrument, intended to be a will, of any kind, is no witness at all to the execution, if he have, provided for him in the will, that beneficial interest, which would disqualify him to prove it as a will, were the instrument to go into operation instantly.

2. That the statute, 25 Geo. 2, c. 6, is of force in this State; that it applies to wills, devising real estate merely, and to mixed wills; that it operates to expunge, at the time of execution, every beneficial interest, specified by it and provided for in the will; and the person so undertaking to attest, who would otherwise be disqualified for the function of attestation, is placed, by that statute, above all exception.

3. That the said statute is as effectual on the question of probate, in the forum of that proceeding, as on any other question in any other forum.

The points now presented for determination are,

First, Does one, who subscribes an instrument intended to be a will or codicil, in character of attesting witness to the execution, wherein he is nominated executor, derive therefrom thereby such interest as disqualifies him to be a good attesting—that is to say, a credible, a competent—witness, to the execution thereof.

Second, If so, does the statute of Geo. 2 operate, and declare him credible—competent—to discharge the function of attestation?

As to the first question :

We must bear in mind, that the legal capacity of any person to attest the execution of a will, is to be referred, as to

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his status, for that function, to the moment of the execution and attestation. Further—that disqualification for that act does not arise from the rule of the common law, which excludes a witness for a direct, certain, positive interest, in the issue, or in the record as evidence, but from the bias, imputed to an expectancy, created by the will, that would be such an interest, if the instrument, executed as a will, should go instantly into operation. For reasoning, which has persuaded this court to adopt such doctrine, it is quite sufficient to refer only to the opinion of Pratt, C. J., (Lord Camden,) reported in 1 Day, 41, note, and transplanted into sundry of our cases, as *Taylor and Taylor*, *Workman and Dominick*, *Cannon and Setzler*. It would be overloading this opinion to reproduce such reasoning; but it may be considered as unanswerable to say, that we must recognize a broad distinction between that disqualification to testify, on a trial, arising from interest, as understood in the general law of evidence, and that disqualification arising from interest in a will, as applicable to one who assumes to attest its execution; because, otherwise, no such interest as that recognized by the general rule of evidence on the occasion of trials, *can be* created and vested in any one by an instrument to act *in futuro*, while it is ambulatory, liable to be revoked, and while the benefit may lapse or be repudiated; and in such latter view, credible or competent, would be made to refer to the time of giving testimony, and not, as the law most plainly and peremptorily requires, to the time of execution; and it would lie in the power of one person to determine whether there should be a case of testacy or intestacy. From this the conclusion follows, that, if the statute of George applies to the case of an executor, it will perform its office, irrespective of the fact of the executor renouncing or qualifying, receiving commissions or not.

It must be admitted, that, in England, the nomination as executor, and even the vesting in him a mere trust to sell, after he was bereft of a right to the residue, did not disqualify

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him for the function of attesting the execution of the will that nominated him; for he had no commissions, and his office, in such circumstances, was considered a burden rather than a benefit. Yet, it is worthy of remark, that in the very case (*Hindson vs. Kersey*, 1 Burr. 414, S. C. 1 Day, 41,) which called forth the well-known and influential opinion of Lord Camden, the witnesses (whose credibility he impeached, though they were sustained by the Court,) had a very indirect interest and one very remotely connected with the will then in question. In *Hatfield vs. Thorp*, 5 Barn. and Ald. 589, three Judges of the King's Bench thought that an indirect interest, (through the wife,) created by a will, did disqualify the husband to attest its execution, and that the statute of George did not help the case: contra, as to the operation of that statute is the case of *Moore vs. McWilliams*, 3 Rich. Eq. 10.

But when he became entitled to commissions, one twentieth part of all moneys received and disbursed, (as he did under our Act of 1789, 5 Stat. 106,) it was considered by this Court that the executor had a beneficial interest under the will, whether he had qualified or not; *Taylor vs. Taylor* and *Workman vs. Dominick* show this. That position, however, is assailed, upon the present occasion, by those who advocate the probate of these wills, in order to show that the executor, having no disqualifying interest to attest, is good for that purpose under our statutes relating to the execution of Wills, and therefore, that in such case the second question above stated need not be encountered since the saving efficacy of the Statute of George is not required. And if the position be sound the consequence follows, though it is in conflict with *Workman vs. Dominick*. But the majority of this Court has resolved, that there is good ground to say an executor nominated in a will does take, by and under it, such beneficial interest (as that phrase has been already interpreted,) as disqualifies him to become a credible—competent—witness to its execution.

It has been already shown, that contingency, as to the

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actual fruition in future of any benefit that may accrue from his nomination, does not afford the true test; for the same applies to all nominated beneficiaries. They are all clothed by the will with a capacity to take and enjoy, *eo instanti*, provided the immediate dissolution of the testator should call the will into effectual operation. (*Vide*, what is said by Lord Camden, 1 Day, 56, note.) And consider the case of an alien wife, a devisee, who under the recent state of our statute law, might take and hold as such until office found; she might at any time have been ousted by proceedings in escheat on the part of the State. In such circumstances could she be held a disinterested, credible and competent witness to a will, which provided a devise for her, as for example, Mrs. Bull, a party in one of these cases?

It is said, however, that the executor does not take his commissions by virtue of the will and that his mere office does not disqualify. No more did he take in England, at one time, the residue, (itself also very contingent,) by virtue of any provision in the will to that effect, although that indubitably would disqualify him to attest its execution; *Betteson vs. Bromly*, 12 East, 250; but it was given to him by law, as commissions are here; both attend upon his office. And the like was true as to a debtor to the testator, nominated executor. Indeed no substantial difference is perceived between the case of an executor as it now exists, and a case where a legacy of value, equivalent to commissions and in lieu of them, should be given, as compensation for care, trouble, responsibility, and expense, in the performance of administrative duty. In some cases, the commissions prove to be very inadequate compensation, in others very ample; and the office may prove, in other respects, a very advantageous position. The executor may recover, under our law, remuneration for extra services—may purchase, at his own sale, property with which he is more familiar than any one else; sometimes he receives more than any legatee or devisee

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his compensation is certain, and the same whether creditors be satisfied or not; and, though he receives because and when he earns, and complies with legal regulations, yet it is no trifling matter, often to have secured the opportunity to earn by the management of estates, well illustrated by a not unfrequent alacrity and competition among several to gain authority from the Ordinary to make such earnings. That he is vested, by law, with the legal estate in personalty, and chuses in action, that, in some sense, he stands in lieu and stead of the testator, are considerations not to be ignored. The reason so often applied to his case in England, that his office imposed a burden, and did not confer a benefit, does not well apply here to the creation of the Act of 1789. We conclude, therefore, that he is such a person, in this State, as does not come under the description of a credible witness to a will of any kind. So much of the argument in *Taylor* and *Taylor*, and *Workman* and *Dominick* as goes to maintain this position, is considered well founded.

As to the second point; does the statute 25 Geo. 2, ch. 6, apply to the case of an executor attesting the execution of a will?

Considering the first point established, that the case of the executor is the same, in its nature, as that of a legatee or devisee, *Cannon* and *Setzler* is full authority to maintain the affirmative. Having placed the executor upon such footing—having shown that renunciation or qualification, as such, will make no distinction, we have before us now two cases perfectly parallel with *Cannon* and *Setzler*.

There is a third question, which, we think ought to be adjudged upon this occasion, and a majority of the court concur upon that also. It is whether the statute 25 Geo. 2, ch. 6, applies to wills of personalty merely, as well as to those mixed, and those containing devises exclusively?

Workman and *Dominick* is directly in the negative, and followed the judgment rendered in *Taylor* and *Taylor*, as

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authority. That judgment was severely shaken by *Cannon* and *Setzler*; no foundation, indeed, was left for it, but such distinction as might exist between the case of executor and legatee. As we have, in this opinion, undertaken to show there is no distinction between them, there seems to be no hazard in saying that, if the case of *Taylor* and *Taylor* were now before us, the decision would be the reverse of what it was. We apprehend that the decision in *Taylor* and *Taylor* may be considered as the progenitor of that in *Workman* and *Dominick*, and we feel at liberty, therefore to review the latter.

The words of the first section of 25 Geo. 2, c. 6, are: "If any person shall attest the execution of *any* will or codicil," (after a day named,) "to whom any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate, (other than and except charges on lands, tenements, and hereditaments, for payment of any debt or debts,) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, (so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him,) be utterly null and void; and such person shall be admitted as a witness to the *execution* of such will or codicil, within the intent of the said Act," (meaning the 5th section of the Statute for the prevention of Frauds and Perjuries,) "notwithstanding such devise, legacy, estate, interest, gift, or appointment." 2 Stat. 580.

It is not to be successfully contested, that the occasion, the practical, existing evils, that gave rise to this statute in England, such as were then known and felt, and which alone it did, in fact, remedy there, all pertained to testamentary dispositions of lands, tenements and hereditaments, and interests in them, devisable by the statute of wills, by custom, or an estate *pour autre vie*, rendered devisable by the 12th section of the Statute of Frauds and Perjuries.

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It is equally incontestable, that the words "any will or codicil," are quite capable to embrace every testamentary disposition, of whatsoever description of property.

No such condition of statutory regulation as to the execution of a will, disposing of personalty only, such as our Act of 1824 created here, ever did exist in England; for no attestation of a will of personalty merely ever was required there until the statute 1 Victoria, ch. 26; sec. 17 of which is as follows: "No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness *to prove the execution* of such will, or a witness to prove the validity or invalidity thereof." It will be observed that this is quite a different sort of remedy from that within the purview of the statute Geo. 2d—for that applied to the *attestation* and not the proof of the execution of a will, and the confounding of the two ideas obliterates the grand distinction, so well drawn by Lord Camden, between a witness to *attest* and one to *prove*. So this section does not prove that the Parliament, on the 3d July, 1837, extended the remedy of the statute Geo. 2d, to wills of personalty only, and that its remedy would not have been applied by the Courts to the same evils, had they existed in that class of wills, as did exist in those contemplated by the Statute of Frauds and Perjuries.

The said statute of Victoria is a new code as to the execution of testamentary dispositions, and repeals the 25 Geo. 2, ch. 6, and it drops the word *credible*. It is not, therefore, a declaratory law as to what was or was not the scope of the statute of Geo. 2d.

Hence we say that the Courts of England never had before them, in the light that the Act of 1824 presents to us, the question of the extent to which the remedy of the statute of Geo. 2d could and should be carried, in order to cure a mischief of the very same kind that gave occasion for its enactment, (*i. e.* in regard to the subject matter of testamentary disposition) though its extension should embrace an evil of a

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different variety. And yet, in 1811, Sir Wm. Grant, (*vide Lees vs. Summersgill*, 17 Ves. 508) certainly no mean professional authority, adjudged that the statute of George did extend to a testament merely. The judgment stood unimpeached, so far as appears, until 1826, at which time it was maintained at bar, by such men as Sugden and Phillimore, though unsuccessfully, before Sir John Nicholl, who, in *Brett and Brett*, disaffirmed it. It was again maintained and disaffirmed in 1827 (*Emanuel vs. Constable*), and a third time in 1829, (*Foster vs. Banbury*); which shows that, even as the matter presented itself in England, there was a persevering support of the case of *Lees vs. Summersgill* for the period of eighteen years. Meantime, between 1811 and 1826, while the doctrine of *Lees vs. Summersgill* stood unimpeached, our Act of 1824 intervened. We had all the English statute law on the subject of the execution of wills, that of Charles 2, George 2, and our own Act of 1789.

In 1824 it was enacted,

"That all wills and testaments of personal property shall be executed in writing, and signed, by the testator, or by some other person, in his presence, and by his express direction; and shall be attested and subscribed, in his presence, by three or more credible witnesses, or else be utterly null and of no effect."

And further,

"No revocation of any will or testament of personal property shall prevail as such which would not be *effectual in law as a revocation of a will of REAL ESTATE*."

Now we must presume necessarily, that the law-givers are acquainted, at all times, with the state of the law upon which they act. Therefore, in 1789, when the 5th section, as well as others, of the Statute of Frauds and Perjuries, pertaining to the execution of wills, was re-enacted, in substance, they knew that the three *credible* witnesses, required for the attestation of a will, were such as were competent to that purpose,

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in the sense of the Statute of Frauds, and such as were made competent by the action of the statute of George 2d; for both existed here at that time, together with a knowledge of the local interpretation of them in England, which generally is adopted as authority in other courts, upon a familiar legal principle in the construction of statutes. Among the cases exhibiting such local interpretation of those statutes was *Lees vs. Summersgill*. When, therefore, in 1824, our Legislature required the same three credible witnesses to attest the execution of a will or testament of personal property, and when especially, they placed a *revocation* of it, in all respects, and in so many words, upon the footing of a revocation of a will of "real estate," it may be confidently demanded, where is the violence done to the sanctity of the legislative domain, the dictates of sound reasoning, the rules of legitimate interpretation, the examples of all Courts under the reign of the common law, in construing statutes upon the doctrine of *pari materia*, when we hold, in relation to a series of statutes, upon the same subject, to wit: the execution and revocation of wills and codicils, that the remedy suitable to cure the only practical mischiefs that attended one class, when the remedy was provided, should apply to the same mischiefs that have been made to attend the other class, by reason of the identity of form enforced upon both classes? When the words, "credible witnesses," were used, in 1824, why exclude such definition of them as the statute of Charles 2 had derived from that of George 2, and such as had been adopted by our Act of 1789? Nobody will deny, that the design of the statute George 2, was to save wills required to be attested by three credible witnesses, by sacrificing the several kinds of beneficial interest specified, and provided therein for an attesting witness. Wills of personalty, since that kind of property has attained its proper dignity, are as deserving of such favor, and have been placed in the same category, as to the mischief that beset them, the danger, the evil, as those of

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reality—and, since the enacting words of the statutory remedy are broad enough to embrace them, why deny them the benefit of its protection? It is, at last, but vacating the interest, which a particular person may be found to have in an instrument which he assumes to attest, *ut res magis valeat quam pereat*; and that is the substantial intent, the remedial scope of the statute of George 2.

A few instances, hastily collected, of such doctrine, in the construction of a single statute, or of a series of statutes, as we favor, not more germane to the same subject matter, than those under consideration, will be subjoined.

Although the preamble is generally the key to the construction of a statute, yet it does not always open all the parts of it; as sometimes the legislature, having a particular mischief in view, which was the primary object of the statute, merely state that in the preamble, and then go on, in the body of the Act, to provide a remedy for general mischiefs of the same nature, but of different species, neither expressed in the preamble, nor, perhaps, then, in immediate contemplation. *Mann vs. Cammel, Loft, 783.*

Strong words, in the enacting part of a statute, may extend it beyond the preamble: *Pattison vs. Bankes*, Cowp. 543. But a preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms: *Crespigny vs. Willenoon*, 4 T. B. 793, per Buller, J.

A statute lately made, may be holden to be within the equity of a statute long since made, and there are, in our books, frequent instances of its having been so holden: Bacon Ab. Statute, J. 3; and see *Vernon's case*, 4 Coke, 4.

In *Sir William Moore's case*, (Ld. Raymond, 1028,) Holt is reported to have said—"For though a subsequent statute may be comprehended within the meaning of an Act precedent, as the Stat. 82 H. 8. of Wills, within the Stat. 27 H. 8. of Jointures, yet that is, when the latter statute is within the same reason as the former, which this is not."

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"Several Acts," (says Ch. Kent, Com. 463, 7 ed.) "*in pari materia*, and relating to the same subject, are to be taken together and compared, in the construction of them, because they are considered as having one object in view and as acting upon one system." "The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred, that a code of statutes, relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions."

Though what we call our Insolvent Debtors' Act was designed to give the relief of a sort of bankrupt system, and the Prison Bounds' Act to mitigate the rigors of actual incarceration, and though Judge Brevard (vide note 2, Dig. 157) thought it extremely difficult to construe the two *in pari materia*, and cites some earlier cases to show it, yet for a long space of time they have been so construed and administered. And if it be said that the Act of 1788, refers internally to that of 1759, the reply is, so does that of 1824, refer to and adopt, in words, as to the mode of revoking a will of personality merely, that of 1789, upon the same subject as to a will of realty.

Behold the consequence of resolving that the statute of George shall not apply to the execution of a testament. The execution of a will of real estate, and a revocation of it, is good, though attested by one who is made competent only by virtue of that statute. By the Act of 1824, "No revocation of a will or testament of personal property shall prevail as such which would not be effectual in law as a revocation of a will of real estate." They are, beyond cavil, to be put on the same footing, as to revocation. Consequently, the execution, in writing, of a revocation of a testament of personal property, which should be attested by a legatee under the provisions of such testament of revocation would be good, for it would be "effectual in law," as such, if it related to a will of real estate, by the force of the statute of George 2d. The result would

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be, that the same man, in the same circumstances, would be a credible attesting witness to the execution of a revocation, who would not be such to the execution of the testament itself. Can it be believed, for a moment, that such incongruity ought to be imputed to our legislation; or be said, upon good foundation, that the judicial construction, which avoids such palpable inconsistency, should be denounced as usurpation of legislative power? Truly, indeed, this might be said, (as it has been in *Cannon and Setzler*, 6 Rich. 484,) if this Court were to attempt, by construction, to save an attesting legatee from the loss of both legacy and distributive share, which has been done in New York and Illinois, (vide 4 Kent Com., 7 ed. p. 585, note d.) by legislative provision. It is this evil which has been admitted to be beyond judicial power, and not the construction of our Acts *in pari materia*. Without further argument or citation of authority, we announce our conclusion, that the statute 25 George 2, ch. 6, applies equally to wills of personalty and of realty.

Inasmuch as the precise point, whether the office of the executor, as well as his commissions, are taken away by the said statute, is not now necessarily presented by these cases, and since the same has not been discussed as a primary inquiry, the matter is not ruled; but it may be said, that, guided by present light upon that subject, the impression of several members of the Court of Errors, is in the affirmative.

A point to this purport was discussed, to wit, that the will of John B. Bull contained no devise, in legal contemplation, because the devise, in terms, seeks to transmit to an alien widow of testator, who cannot take because of alienage, and besides, the will provides that the real estate shall be converted into personalty and remain such. There is no difference of opinion among us, that an alien widow may be devisee to take and to hold until office found, and that the State may forbear to take measures to oust; and if there be no more than a devise to trustees to sell, and the proceeds are

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declared, or by consequence become, personalty, we all agree there is yet a devise, and the will cannot act to produce a conversion until it has been duly established as a will of real estate. And this conclusion is not shaken by anything said to be derived from *Wilkins* and *Taylor*, and *Mathis* and *Guffin*, adjudged in the Court of Equity. If there be anything to the contrary, in these cases, it finds no support in this Court.

The case of *W. P. Noble vs. Andrew P. Burnett*, must go back to the Circuit Court, upon the ground of error in excluding Edmund C. Martin, for incompetency to attest the execution of the will in question; and the other case must go back to the Court of Probate, upon the same ground of error, and that Court be left to inquire and determine whether the incompetence of Dawson to *testify in the cause* can be supplied by secondary evidence; and it is so ordered and adjudged.

JOHNSTON, DARGAN and WARDLAW, CC., and WARDLAW, WHITNER, and MUNRO, JJ., concurred.

O'NEALL, J., dissenting said: The cases of *Taylor vs. Taylor*, and *Workman vs. Dominick*, are decisive of these cases; and little as I concurred in those decisions, I think it is safer and better to adhere to them.

I might have assented to the decision in *Noble vs. Burnett*, if it had been put upon the ground that Martin, the person named as executor, and a witness to the will, had refused to qualify, and was never, therefore, in any sense, executor.

But I cannot agree that the statute of George in its intent or terms, embraced an executor.

In *Corbett's* case, Mr. Dawson, the executor, is plaintiff on the record; it is, I believe, conceded, that he cannot be a witness to prove the will, and yet proof of his handwriting is to have the effect of doing more than he can do.

If the statute of George reaches him, he is neither executor, nor has he any business to be before the court as demanding

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probate of the will, and, of course, the motion should be dismissed in his case.

DUNKIN, Ch., *dissenting*. In *Cannon vs. Setzler*, 6 Rich. 471, the Court of Errors expressed strongly the opinion, that the existing state of the law upon the subject of the attestation of wills was proper matter for legislative interference. "To the Legislature it belongs" (in the language of the Court) "to extricate the whole subject from the perplexity in which legislation has involved it. To the Court it belongs to expound and apply the law; amendments of it, and more especially of the Statute law, however desirable they may appear, must be referred to the wisdom of another branch of the government."

I am unable to concur in this decision, because I regard it as an encroachment upon the rights and duties of a co-ordinate part of the government—as a legislative, and not a judicial act. As an act of legislation, (in the construction which I give to the opinion) I regard it as incomplete and of doubted expediency.

It seems now to be generally conceded that the competency of the witness must be referred to the period of attestation. Upon the death of the testator, the legal title, in all his personalty, becomes vested in the executor, and, according to the law and usages of this State, he has an extensive control over the realty. It is a very imperfect view, to measure the bias of such person, in favor of supporting such instrument, by the commissions he may receive upon his financial operations. Places of honor, and trust, and influence, have their affections as well as offices of profit, and are not less eagerly sought. In *Taylor vs. Taylor*, 1 Rich. 531, some of the reasons are stated why the case of an executor was not within the terms, as it clearly was not within the purview or intention of the statute 25 Geo. 2. It is not proposed to re-produce what is there stated. But the Statute 1 Victoria, c. 26, enacted in 1837, leaves little doubt as to the construction of the statute

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upon this subject in the country where it was made. Under the statute of Victoria, wills of land and personalty are placed on the same footing. By the 15th section, the provisions of the statute 25 Geo. 2, are, *in terms*, re-enacted, (extending their application to the case of husband or wife). If an executor had any such disqualifying pecuniary interest, as was contemplated by the statute, it was thereby removed: according to the construction now adopted. But, under the law of England, an executor is entitled to no commissions, nor is he now entitled to the undisposed of residue. Nevertheless, in order to qualify him to be a competent witness, under the statute of wills, it was deemed proper to provide a separate clause. By the 17th section, it is enacted, "that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof." This was a strong act of the Imperial Parliament, giving competency to a witness apparently disqualified by his character. Many reasons would commend a similar policy to the Legislature of South Carolina. To take away a legacy injures no one but the unfortunate witness; but to take away the office of an executor—to remove one whom the testator has selected to stand in his place—would, not unfrequently, strike out the most important clause of the testator's will, and frustrate his scheme for the management and distribution of his property. On the other hand, to declare that he shall have no compensation if he assume the duties, will only add to the motives for declining an onerous and thankless office. But these are mere considerations of expediency, addressing themselves to the law-making power.

The effect of the decision, now announced, is to take away the office of an executor, without the sanction of any law, or to deprive him of commissions for the discharge of his duties, which are secured to every executor by the Act of 1789.

Motions granted.

APPENDIX.

ED. H. MARTIN *vs.* SAMUEL SOLOMONS.^(a)

A garnishee in foreign attachment is not entitled to set off the amount due by him to the absent debtor, against his liability as accommodation endorser of the absent debtor, on a promissory note not due when the writ in attachment was served, although the garnishee, before making his return, and also before the note fell due, paid the note by substituting another in its place.

BEFORE GLOVER, J., AT BEAUFORT, SPRING TERM, 1855.

On the 29th March, 1854, Edmund H. Martin issued a writ in foreign attachment against Samuel Solomons, an absent debtor. On the 30th March, 1854, a copy was served on John G. Solomons; and on the 31st March, 1854, one was served on William P. Solomons, as garnishees.

On the 31st March, 1854, George W. Garmany sued out another writ in foreign attachment against the same defendant, and copies were served on John G. and William P. Solomons on the 7th April, following.

On the 2nd October, 1854, John G. Solomons made a return "that he has in his possession one old negro man named Sharper, aged about sixty-five or seventy years—one old rifle—and S. J. Davis' note for thirty-eight dollars and twenty-two cents, dated November 8th, 1852, and payable one day after date, as the property of the said Samuel Solomons: and

(a) This case belongs to Charleston, January Term, 1857, but the copy of the opinion did not reach the reporter in time for its insertion in the proper place. R.

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he further swears that he is informed by the said Samuel Solomons, that he, the deponent, stands indebted to the said Samuel in about the sum of four hundred dollars on book account; but of this the said deponent cannot speak positively, inasmuch as the said books are at this time in the City of Savannah. And the deponent further swears, that the said deponent, before and at the time of the service of said writs of attachment, was liable as indorser of the said Samuel, who now is indebted to this deponent in the sum of three thousand dollars, besides interest, by reason of this deponent's settling a debt of that amount due by said Samuel Solomons to one

Hartridge by note, (on which deponent was indorser for said Samuel Solomons,) to wit: by the substitution on or about the first day of April last, of this deponent's individual note, with security in lieu and satisfaction of the one on which deponent was liable as indorser as aforesaid; and he therefore claims the full benefit of the premises as a creditor in possession, according to the Statute in such case made and provided; and further, that except the foregoing, the deponent had not, at the time of the service of said attachment, nor since, any moneys, &c., in the hands, possession or power of said deponent."

On the same day, 2nd October, 1854, Williams P. Solomons made return, "that he is informed that he stands indebted to the said Samuel Solomons in the sum of four or five hundred dollars on book account; but of this he cannot speak positively, inasmuch as the said books are at this time in the City of Savannah. And deponent further swears, that the said Samuel Solomons on or about the 10th day of April last, became and now is indebted to deponent in the sum of thirty-five hundred dollars, besides interest, by reason of deponent's settling a debt of that amount due by said S. Solomons to Harper & Stuart by a note on which deponent was indorser for said Samuel Solomons, to wit: by the substitution of this deponent's note, dated 10th March, 1854, with security, in lieu

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and satisfaction of the one on which deponent was liable as indorser as aforesaid. And he therefore claims the full benefit of the premises as a creditor of the said Samuel Solomons according to the Statute in such case made and provided"—and that he had no other moneys, &c.

On the 30th October, 1854, Samuel Solomons confessed a judgment in the case of Ed. H. Martin, which was entered up on the 31st.

On the 3rd November, 1854, Judge Wardlaw ordered that the garnishees have leave to amend their returns by stating the sums respectively due by them to the said absent debtor, and the dates of their indebtedness, and also, to file their declarations as creditors in possession according to the Statute in such case made and provided, to the next term of the Court.

On the 1st January, 1855, Samuel Solomons confessed a judgment to John G. Solomons for three thousand one hundred and twenty-six dollars and fifty-eight cents, and one to William P. Solomons for three thousand six hundred and twenty-two dollars and fifty cents.

On the same day, 1st January, 1855, John G. Solomons filed his amended return, "that since the last term of the Court he has been furnished with a statement of his indebtedness to the said Samuel Solomons on factor's account, by which it appears, that on 6th March, 1854, (when the account terminates,) the balance against this deponent was one hundred and eighty-three dollars and forty cents, which, to the best of his knowledge and belief, is the whole amount due by him to said Samuel Solomons. And further, that on 25th January, 1854, the said Samuel Solomons made a promissory note, payable to deponent four months after date for three thousand dollars, which was indorsed by deponent for the accommodation of said Samuel Solomons, who discounted the same and received the money arising therefrom to his own use. That deponent afterwards, to wit: on 4th April, 1854, substituted his note

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(with surety) for the principal and interest due on said promissory note, to wit: for the sum of three thousand one hundred and twenty-six dollars and fifty-eight cents, and on 6th December, 1854, deponent paid on said substituted note the sum of one thousand eight hundred dollars. He therefore prays that so much of said indebtedness of the said Samuel Solomons to deponent as will satisfy said balance on factor's account, be set off against the same."

On the 15th January, 1855, William P. Solomons made his amended return, "that since the last term of the Court, he has been furnished with a statement of his indebtedness to the said Samuel Solomons on factor's account, by which it appears that on 16th March, 1854, (when the account terminates) the balance against this deponent was two hundred and ten dollars and sixty-four cents, which, to the best of deponent's knowledge and belief, is the whole amount due by him to said Samuel Solomons. And further, that on 8rd March, 1854, the said Samuel Solomons made a promissory note payable to this deponent ninety days after date, for thirty-five hundred dollars, which was indorsed by deponent for the accommodation of said Samuel Solomons, who discounted the same and received the money arising therefrom to his own use. That deponent afterwards, as stated in his original return as garnishee, substituted his individual note (with sureties) for the principal and interest due on said note, to wit: for the sum of three thousand six hundred and twenty-two dollars and fifty cents, and on 6th December, 1854, deponent paid on said substituted note the sum of two thousand three hundred and forty-one dollars and six cents. He therefore prays, that so much of said indebtedness of said Samuel Solomons to deponent, as will satisfy said balance on factor's account, be set off against the same."

On the 6th April, 1855, the following orders were made, to wit:

· "On hearing the return of John G. Solomons, a garnishee

Charleston, January, 1857.

in this case, and the amendment thereof, and on motion of Davant, Plaintiff's Attorney, it is ordered that the said John G. Solomons, do, within thirty days, pay to the said Edmund H. Martin the sum of one hundred and eighty-three dollars and forty cents; and in default thereof, the said Edmund H. Martin have leave to enter up his judgment against the said garnishee, and issue his execution thereon. It is further ordered, that the said John G. Solomons do forthwith deliver to the Sheriff of Beaufort District, the negro named Sharper, the rifle gun, and the note of Samuel J. Davis, which he admits to be in his possession: and that the said Sheriff do advertise and sell the same on the first Monday in May next, and pay the proceeds of such sale to the said Edmund H. Martin."

"On hearing the return of William P. Solomons, a garnishee in this case, and the amendment thereof, and on motion of Davant, Plaintiff's Attorney, it is ordered that the said William P. Solomons do pay to the said Edmund H. Martin the sum of two hundred and ten dollars and sixty-four cents within thirty days from this date; and in default thereof, that the said Edmund H. Martin have leave to enter up his judgment against the said garnishee; and issue his execution thereon."

John G. and William P. Solomons appealed and moved this Court to reverse the orders made, and for leave to credit the amounts severally due by the said John G. and William P. Solomons, to the absent debtor, on their respective judgments against him.

Because, the garnishees were entitled to retain the property, and especially the debts attached, as creditors in possession.

The case was first argued in January, 1856, and was reargued at this term.

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(with surety) for the principal and interest due on said promissory note, to wit: for the sum of three thousand one hundred and twenty-six dollars and fifty-eight cents, and on 6th December, 1854, deponent paid on said substituted note the sum of one thousand eight hundred dollars. He therefore prays that so much of said indebtedness of the said Samuel Solomons to deponent as will satisfy said balance on factor's account, be set off against the same."

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"On hearing the return of William P. Solomons, a garnishee in this case, and the amendment thereof, and on motion of Davant, Plaintiff's Attorney, it is ordered that the said William P. Solomons do pay to the said Edmund H. Martin the sum of two hundred and ten dollars and sixty-four cents within thirty days from this date; and in default thereof, that the said Edmund H. Martin have leave to enter up his judgment against the said garnishee; and issue his execution thereon."

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Because, the garnishees were entitled to retain the property, and especially the debts attached, as creditors in possession.

The case was first argued in January, 1856, and was reargued at this term.

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(with surety) for the principal and interest due on said promissory note, to wit: for the sum of three thousand one hundred and twenty-six dollars and fifty-eight cents, and on 6th December, 1854, deponent paid on said substituted note the sum of one thousand eight hundred dollars. He therefore prays that so much of said indebtedness of the said Samuel Solomons to deponent as will satisfy said balance on factor's account, be set off against the same."

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"On hearing the return of William P. Solomons, a garnishee in this case, and the amendment thereof, and on motion of Davant, Plaintiff's Attorney, it is ordered that the said William P. Solomons do pay to the said Edmund H. Martin the sum of two hundred and ten dollars and sixty-four cents within thirty days from this date; and in default thereof, that the said Edmund H. Martin have leave to enter up his judgment against the said garnishee; and issue his execution thereon."

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The case was first argued in January, 1856, and was reargued at this term.

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"On hearing the return of William P. Solomons, a garnishee in this case, and the amendment thereof, and on motion of Davant, Plaintiff's Attorney, it is ordered that the said William P. Solomons do pay to the said Edmund H. Martin the sum of two hundred and ten dollars and sixty-four cents within thirty days from this date; and in default thereof, that the said Edmund H. Martin have leave to enter up his judgment against the said garnishee; and issue his execution thereon."

John G. and William P. Solomons appealed and moved this Court to reverse the orders made, and for leave to credit the amounts severally due by the said John G. and William P. Solomons, to the absent debtor, on their respective judgments against him.

Because, the garnishees were entitled to retain the property, and especially the debts attached, as creditors in possession.

The case was first argued in January, 1856, and was reargued at this term.

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date hereof, and our liability thereunder not to exceed five thousand dollars.

CHARLES GLOVER,
WILLIAM KNOTTS,
V. D. V. JAMISON,
JAMES GRIMES.

"The letter was sent by mail, post marked 28th Sept., 1847, addressed to Sanders Glover, marked in pencil by President of Bank Sept., 1847, and the proof shewed its acceptance by the Bank 28th Oct., 1847.

"Glovers & Davis procured extensive accommodations in the Bank from this period until some time shortly preceding their failure in business, which happened in September, 1852.

"The notes of Glovers & Davis discounted in bank for their benefit, endorsed by A. E. Glover, were regularly protested, and were as follows:

- | | | | | | | | | | | | |
|----|------|---------|------|------|--------|-------|----|----|-------|-----|----------|
| 1. | Note | bearing | date | 7th | Aug., | 1852, | at | 60 | days, | for | \$2,800. |
| 2. | " | " | " | 24th | " | " | " | 30 | " | " | \$3,800. |
| 3. | " | " | " | 18th | Sept., | " | " | 10 | " | " | \$3,500. |
| 4. | " | " | " | 18th | " | " | " | 15 | " | " | \$3,500. |
| 5. | " | " | " | 18th | " | " | " | 60 | " | " | \$6,000. |

"January 17th, 1853, the Cashier of Bank mailed a letter addressed to defendant, at Orangeburg, C. H., communicating the default of Glovers & Davis, reminding defendant of the letter of guaranty, asking his attention thereto, and offering to submit any propositions he might have to make to the Board. To this letter no answer was received, nor did it appear that the defendant had received the letter though he resided in Orangeburg District.

"July 11th, 1853, a second letter was written by Cashier of Bank, enclosing copy of former communication, and addressed to defendant, at a post-office in his more immediate neighborhood. To this defendant replied under date July 15th, 1853,

Columbia, May, 1856.

expressing a desire to avoid the payment of costs, and offering to pay *his part*, one-fourth, on procuring a full discharge, &c.

"Mr. A. E. Glover, the endorser of these notes, proved admissions of the President that the Bank had taken collaterals as a further security for the discounts, which had run up to thirty-two thousand dollars; but it did not appear any thing had been, or was likely to be received from them.

"The statute of limitations was pleaded—the writ was lodged 9th February, 1854—the declaration set out the guaranty, but alleged no new promise.

"I thought the statute a complete bar to plaintiff's demand, and would have so ruled on circuit; but, as the terms of the guaranty were somewhat peculiar, and there were other grounds on which defendant relied, I thought it better to overrule this as a ground of defence, that the judgment of the jury might be had on any questions of fact to be brought out.

"I did not perceive, however, that the testimony presented any matter of defence that might avail the defendant; and so said to the jury. On the subject of the notice to which defendant might be entitled, of default of payment by Glovers & Davis, I said it was not easy to fix definitely the rules which should govern in such a case as this, being less rigid than as to endorsers; that in this State it had been held notice of non-payment was not necessary to charge a guarantor of a bond, or of a note absolute in its terms, and definite as to its amount and extent; that the object of all such notice was to enable the party to protect himself against loss, and that although what was the diligence required in giving notice of non-payment was a mixed question of fact and law—yet that in this case, assuming as true what had been proved, I saw no such want of diligence as should discharge the defendant. In finding for the plaintiff, the jury were instructed to allow interest on the sum guaranteed from the time of default, and although the verdict was rendered after I left the court, I am

Bank vs. Knotts.

informed it was for the plaintiff, for five thousand dollars, with interest from 1st of October, 1852."

The defendant appealed and renewed his motion for a non-suit on the ground, that the plaintiffs' right of action was barred by the Statute of Limitations; and at the same time moved for a new trial on the grounds:

1. Because, it is respectfully submitted, that his Honor erred in charging the jury, that the Bank was not bound to notify the defendant of the default of payment by Glovers & Davis.

2. Because the evidence establishes that the plaintiffs were guilty of such laches as discharged the defendant.

3. Because, it is respectfully submitted that his Honor erred in charging the jury, that interest was recoverable on the cause of action sued on.

Bauskett, for appellant.

Hayne, contra.

The opinion of the Court was delivered by

MUNRO, J. The ground for a non-suit is, that the plaintiffs' cause of action was barred by the Statute of Limitations.

To determine this, it is necessary to look, 1. To the character of the instrument sued on; 2. To the time when the plaintiffs' cause of action accrued.

The instrument sued on is declared upon its face to be a continuing guaranty, and that it is to remain of force till revoked by written notice to the president or cashier of said bank.

It appears, from the circuit report, that the guaranty was

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accepted by the plaintiffs on the 28th of October, 1847, from which time, and upon the faith of which, Glovers & Davis procured from the plaintiffs extensive accommodations; all of which appears to have been promptly met by them up to the period of their failure in 1852, when they failed to pay the notes, which the plaintiffs are now seeking to recover, under the defendant's guaranty. Chitty, in his *Treatise on Contracts*, page 435, defines a contract of guaranty to be, "A collateral engagement to answer for the debt, default, or miscarriage of another, as distinguished from an original agreement, for the party's own act. It is therefore of the essence of this contract, that there must be some one liable as principal, and accordingly, when one party agrees to become responsible for another, the former incurs no obligation as surety, if no valid claim ever arises against the principal; whilst on the other hand, the liability of the surety upon a claim which is good as against the principal, ceases so soon as such claim is extinguished."

It is argued, that the Statute of Limitations commenced to run from the time the guaranty was accepted by the plaintiffs. But it is obvious, that such a position can only be sustained by confounding the collateral undertaking of a surety for the debt, or default of his principal, with an original undertaking for his own act; for until the plaintiffs were damnified by Glovers & Davis' failure to meet their engagements at maturity, it is clear that the plaintiffs had no right of action, even as against the principals, much less against the defendant as their surety,—so that in no point of view can the defence of the Statute be sustained; for no principle is better established than this—that the Statute of Limitations does not begin to operate from the time when a contract is actually made, unless a full and complete cause of action instantly accrue thereon;(a) and again, "In case of a contract

(a) Angell on Lim., p. 181; Chitt. on Con., 708; 2 Rich., 113.

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of indemnity the Statute does not apply, until the lapse of four years from the actual damnification."^(a)

The ground for a new trial charges error in instructing the jury, that the bank was not bound to notify the defendant of the default in payment by Glovers & Davis.

The position here assumed is, that the want of notice of default in payment by the principal, is a virtual abandonment of recourse against the surety, upon the principle applicable to negotiable instruments.

But it is clear, that the analogy does not hold good, for in no sense of the term is a guaranty, such as the one in question, a negotiable instrument; on the contrary, the legal relation that is created, between the principal and the maker, by this species of contract, is that of principal and surety; so that the guarantor stands upon the footing of any other surety, and is therefore only entitled to notice, when he may be prejudiced by the want of it; See 3 Kent's Com. 166, where, in treating of guaranties, the rule is thus stated: "The rule is not so strict as in the case of mere negotiable paper, and the neglect to give notice must have produced some loss, or prejudice to the guarantor;" See also, Chitty on Bills, 324; Story on Bills, 302, 372; 7 Peters, R. 113; *Bank vs. Hammond*, 1 Rich. 281.

The motions for a non-suit, and for a new trial are therefore dismissed.

O'NEALL, WARDLAW and WITHERS, JJ., concurred.

Motions dismissed.

(a) Chitt. on Con., 709; Barge on Suretyship, 272.

ADDITIONAL RULES OF COURT.

LAW COURT OF APPEALS.

COLUMBIA, NOVEMBER TERM, 1856.

PLATS.

96. In preparing a plat for the use of the Court, a surveyor shall represent a building, fence, or the like, by a mark of due proportion in size, according to the scale of the plat. He shall by some small but distinct letter or figure, distinguish every corner, and every station, blazed tree, or other point which is likely to be the subject of dispute. He shall take care not to render the plat confused or indistinct, by crowding too much upon it; but he shall rather refer by letters or figures to a table (which may contain the courses and distances of lines—the marks at corners, stations and noted points—explanations and remarks,) than attempt to write much on the lines, or near to points on the plat. He shall also make two drafts or duplicates of the plat, so that on the trial there may be one for the use of the Judge and the other for the parties in Court. This rule and the 45, 46, 47 and 48 Rules of Court shall be appended to every rule of survey served on a surveyor.

JURY IN FELONY.

97. Hereafter, in the formation of a jury for the trial of a felony, where the right of peremptory challenge is claimed and allowed, a child under ten years of age shall, in the

presence of the Court, draw one from the names of all the jurors in attendance, which one having answered, shall be presented to the accused; and so on until in regular course the panel may be exhausted or a jury be formed.

PREPARATION OF CASES, ABSTRACTS, &c.

98. Attorneys shall make such preparation for every trial, and for every motion on circuit, that the Judge on circuit shall, without writing more than notes of the oral testimony given by witnesses adduced in Court, have, in a permanent form, the means of exact information, sufficient for his understanding the points involved, for his instructing the jury fully, and for his making a report to the Court of Appeals.

In specification of the duty required under this rule, the following particulars are specially enjoined, viz:

First. In every action of trespass to try titles, every action of trespass q. c. f. involving title, and every other action or proceeding, wherein title to land is brought in question, the attorney on each side shall, at the opening of his case or defence, lay before the Judge a plain and orderly abstract of the title which he intends to offer. This abstract shall contain names, dates, numbers, material description and other particulars known to be controverted—in reference to papers in a chain of title—to deaths, births, heirship or other important incident—to title by descent, devise, partition, sheriff's sale, possession or other means; and it shall, where there is known to be a dispute about location, specially describe the claim set up by the party for whom the attorney acts, and be accompanied by a copy of the plat, or so much of it as may be necessary; and in every case the abstract shall clearly and succinctly exhibit the matters in contest, as they are understood by such attorney.

Second. In every case where any record, legal proceeding, award, grant from the State, deed of Conveyance, deed of any

kind, covenant, bill of sale, mortgage, agreement, bond, bill of exchange, single bill, promissory note, affidavit, letter, certificate, notice, advertisement, extract from a book or from a paper of any kind, or other matter, written or printed, is offered in evidence, or is adduced for the consideration of the Court, there shall be laid before the Judge either a copy of such matter or an abstract of it. This abstract shall show the nature of such written or printed matter, the names of the parties to it and of third persons mentioned in it, (when the names of such third persons are material,) the date and so much of the description or other operative part thereof as will make intelligible what it is intended to show, and the points of dispute concerning it. Further abstract of a paper contained in a chain of title will be unnecessary, if it has been put into such abstract of title as is required by the first specification.

Third. The attorney, who offers admissions of the adverse party or the written testimony of witnesses, shall lay before the Judge a copy of such admissions or testimony, if they have previously been accessible to him, such as written admissions of party or counsel, testimony taken by consent, extracts from letters, depositions which had been opened on a former trial or opened by consent, and the like.

Fourth. In every case where, by demurrer or otherwise, a question concerning pleadings is presented, the actor in such question shall lay before the Judge such abstract of the pleadings as will fully exhibit the question. In every action of slander, the words charged in each count shall be shown by an abstract laid before the Judge.

Fifth. The appellant's attorney shall hand to the Judge, with the notice of appeal in any case, or within one week after serving such notice, a copy of all interrogatories and depositions taken by commission, which were read on the trial; or if the Judge shall specially dispense with portions

thereof, then a copy of so much thereof as shall not have been so dispensed with.

Sixth. Copies of all affidavits and other papers which were read in a case but not offered in evidence, and of all motions made in it, whether granted or rejected, shall also accompany a notice of appeal, or follow it within a week, as above mentioned, where the appeal requires such papers or motions to be referred to in the report; or in default of copies, such abstracts and extracts, as may be sufficient for the report, according to directions given by the Judge, when he may dispense with full copies.

The Court of Appeals may disregard all complaint concerning any matter omitted or mis-stated in decision, instructions to the jury or report, where such matter was not in the oral testimony of witnesses adduced in Court, and the means of exact information concerning it should, according to this rule, have been given to the Judge on circuit by the party complaining, and were not so given.

GENERAL GROUNDS OF APPEAL.

99. A ground of appeal in general terms of objection, such as, "that a verdict (or decree) is contrary to evidence," or "that an order (or direction) is contrary to law," will be disregarded, unless it be accompanied by specifications of the particulars wherein the evidence was repugnant or deficient, or wherein the law was violated.

POINTS AND AUTHORITIES IN BRIEF.

100. In addition to the report, the grounds of appeal, and matters which by the report may be required to be printed, an attorney bringing up an appeal, shall have printed the points which he makes, and the citations of authority on.

which he intends to rely; and he shall furnish, of the brief thus prepared, a copy to the opposite attorney, at least two days before the appeal will be heard, and a copy to each of the Judges, and one to the reporter, at the hearing. A specimen, by way of illustration, is placed in the hands of the reporter, to be printed with these additional rules in his next volume of reports.

JOHN BELTON O'NEALL,
D. L. WARDLAW,
T. J. WITHERS,
J. N. WHITNER,
THOMAS W. GLOVER,
R. MUNRO.

SPECIMEN BRIEF.

SUPREME COURT OF THE UNITED STATES.

WASHINGTON J. BENNET, *Appellant*,

vs.

JOSHUA W. MOTT, *Appellee*.

BRIEF ON THE PART OF APPELLEE.

ABSTRACT OF PLEADINGS AND STATEMENT OF CASE.

The appellee on the 24th day of February, 1847, filed his bill, with sundry affidavits, in the Circuit Court, for the district of South Carolina, praying an injunction and account against appellant. *Record*, p. 1.

The bill in the usual form, alleges,

FIRST. The invention of a new and useful machine for planing, tongueing, and grooving boards, by William Woodworth, and the grant of letters patent therefor, bearing date December 27th, 1828, (*R. p. 2.*) referring to the specification thereof. *Exhibit R. p. 34, 35, and 36.*

SECOND. The death of Woodworth, and grant of letters of administration to his son William W. Woodworth. *R. p. 3.*

THIRD. The extension, by the commissioner, of the letters patent for the term of seven years, from December 27th, 1842, to December 27th, 1849. *R. p. 3.*

FOURTH. The transfer of title. *R. p. 4, and Exhibits, pp. 36 to 41, inclusive.*

FIFTH. The second extension, by Act of Congress, from December 27th, 1849, to December 27th, 1856, approved 26th February, 1845. *R. p. 5.*

SIXTH. The surrender and re-issue of the said letters patent, on an amended specification, July 8th, 1845, (*R. p. 6.*) and exhibit of the same, with the several certificates of extension. *R. p. 6 to 11, and 32, 33 and 34.*

SEVENTH. Charges infringement by the use, on the part of appellant, of a machine, for planing, tongueing and grooving planks, substantially like the said patented Woodworth machine, within the territory, wherein the appellee holds the exclusive right. *R. p. 12, 13.*

The bill was accompanied with,

EIGHTH. Affidavits sustaining the averments. *R. p. 13 to 17 inclusive.*

On the seventh day of April, 1847, the Court was moved, for a preliminary injunction. *R. p. 22.*

Opposed by appellant, who was defendant on the Circuit, by affidavits. *R. p. 18 to 22.*

On the 8th day of April, 1847, an order was made, enjoining the appellant from making or using any other machine similar to the one then in use, requiring him to file a statement of the gross proceeds and net profits of the machine used from the first of April, 1846, to that time; that thereafter, a statement thereof should be filed monthly, and re-

quiring him to give bond and security to abide the final order of the Court; but the Court suspended its action for the injunction as prayed for, until the coming in of defendant's answer. *R. p. 23, 24.*

Subsequently appellant filed his answer, in which he set forth in substance,

FIRST. That the re-issued letters patent of July 8th, 1845, according to the true construction and meaning of the specification thereof, are not for the same subject matter for which the original letters patent of 1828 were granted; that the said two letters patent, are not for the same invention or improvements, but are essentially and substantially for different things. *Record p. 24.*

SECOND. That Woodworth was not the original and first inventor of the thing patented in the patent of 1828, or the patent of 1845, or any part claimed as new in either of the said patents. *R. p. 24, 25.*

THIRD. That the machine described in the patent of July 8th, 1845, is compounded of the inventions of various persons, other than Woodworth, without stating by whom invented, or when and where used, described or published. *R. p. 25.*

FOURTH. That the planing machine constructed and used by appellant was patented in 1836, to one Ira Gay, and transferred to him; and with improvements in the part for tongueing and grooving, patented to Baldwin and Shepherd, in 1845, and also transferred to him, all of which he avers to be substantially different in principle and mode of operation from the Woodworth machine, and that he did not infringe the rights of appellee. *R. p. 25, 26 and 27.*

The appellant's amended answer gives,

FIRST. The names and places of residence of sundry persons, whom he avers had knowledge of, and used planing machines substantially like the Woodworth machine, and prior to the alleged invention thereof, by Woodworth, and also refers to certain prior patents granted for, and publications giving descriptions of like machines. *R. p. 28, 29 and 30.*

SECOND. Alleges that the first extension granted, by the commissioner, and the second extension granted by Congress were fraudulently obtained. *R. p. 30.*

THIRD. And that Wm. Woodworth, the administrator in the re-issued patent of July 8th, 1845, fraudulently described and claimed as original, certain inventions and improvements which his intestate never invented or claimed. *R. p. 30.*

Appellee's replication and exhibits will be found. *Record, pp. 32 to 41 inclusive.*

And the statement of accounts by appellant under the order of the Court. *R. p. 42 to 55 inclusive,*

And appellee's additional evidence will be found. *Record, pp. 55 to 60 inclusive.*

The pleadings and proofs being completed and prepared, the cause came on to be heard, and at the final hearing, the appellant offered no testimony to rebut the evidence adduced in support of the bill, but asked for a trial by jury. *R. p. 55 to 61.*

On the 4th of June, 1849, the Court filed its decree, granting a perpetual injunction, without sending the case to a jury, and ordered the master in chancery, appointed *pro hac vice*, with the usual powers of such an officer, to take and state an account, and to ascertain and report the damages the appellee had sustained. *R. p. 83, 84 and 85.*

The opinion of the Court will be found. *R. p. 61 to 83 inclusive.*

The master filed an elaborate report, with the testimony taken by him, on the 27th day of November, 1849, and recommended that the total amount set forth, either in his statement *S. or T.* (*Record, pp. 144, 145.*) should be awarded to the appellee, as the Court might adjudge upon the consideration of the testimony.

After hearing argument on the master's report, and exceptions thereto, the Court, on the 31st day of October, 1851, filed its decree, overruling the appellant's exceptions, to the report, and decreeing that a certain sum should be paid by appellant, being balance of profits, which the Court considered as having been received by appellant for dressing lumber, after deducting the cost of the rough boards, and the expense of dressing them, and also the amount of expenditures incurred for counsel fees, and other expenses incident to the preparation and argument of the case, and not taxable as costs, as set forth in the statement No. 10, (*R. p. 117.*) annexed to the master's report. *R. p. 248, 249.*

Before the final decree on the master's report, and after the final hearing and decree granting a perpetual injunction, viz: on the 28th October, 1850, the appellant petitioned the Court to grant a re-hearing. *R. p. 159, 160.*

On the 28th of August, motion was made by counsel for appellant, praying an order for issues to be tried by a jury. *Record, pp. 164 to 221.*

These motions were denied. *R. p. 221.*

The defendant on the Circuit has appealed from the final decree, filed October 31st, 1851, and from the decree filed June 4th, 1849, as well as from all other orders and decrees made by the Court in the cause. *R. p. 251.*

The questions which arise in this case are,

FIRST. In an equity suit under the patent act, is a defendant who denies in his answer, the validity of complainant's patent, and the infringement thereof, *entitled, as*

of right, to have these questions tried on the law side of the Court; or is it discretionary with the Court to determine all the issues, as well of fact as of law, on the equity side?

SECOND. If it be *within the discretion of the Court*, in such cases, to determine the issues, or to send the parties to the law side of the Court to have them tried, *does an appeal lie to the Supreme Court of the United States, from the exercise of such discretion?*

THIRD. After a cause has been set down for final hearing, on bill, answer and proofs, and *without any motion having been made for a trial at law*; and at the hearing, the defendant offers no proof in support of his answer, and in reply to the complainant's proofs, *is he entitled, as of right, to an order out of Chancery, to try the questions at issue, on the law side of the Court?*

FOURTH. Have not Courts of Equity jurisdiction to suppress oppressive, vexatious, and multiplied litigation?

FIFTH. Is the decision of a Circuit Court of the United States, refusing a motion to grant a re-hearing, matter for review on appeal?

SIXTH. What is the measure of compensation, to which a successful complainant is entitled, in an equity suit under the patent acts?

QUESTION I.

In an equity suit under the patent act, is a defendant who denies in his answer, the validity of complainant's patent, and the infringement thereof, entitled, as of right, to have these questions tried on the law side of the Court, or is it discretionary with the Court to determine all the issues, as well of fact as of law, on the equity side?

Under this question, it may be contended on the part of appellant, as it was at the Circuit, that when the validity of the patent, and the infringement thereof, are denied in the defendant's answer, these questions must be tried by a jury. That this privilege is secured by the 7th amendment of the Constitution, and § 16 of the Judiciary Act of 1789.

1 U. S. Statutes at Large, 82.

And that the Circuit Courts of the United States, sitting in equity, are only ancillary to the Courts of Law.

But it will be contended on the part of appellee,

1st. That the 7th amendment of the Constitution has no application to Courts of Equity, and only secures the right of trial by jury, in cases at "Common Law;" and that the terms "Common Law," in this clause of the Constitution, are used in contradistinction to equity, admiralty and maritime jurisprudence.

3 Story's Com. § 1762.

Parsons *vs.* Bedford, et al. 3 Peter, 446.

The Judiciary Act of 1789, § 16, simply provides, "that suits in equity shall not be sustained in either of the Courts of the United States in any case where *plain, adequate and*

complete remedy may be had at law." and it has been decided by the Courts of the United States, that this provision is merely affirmative of the general doctrine of Courts of Equity, and was in no sense intended to narrow the jurisdiction of the Courts of the United States, and that the equity jurisdiction of those Courts depends upon what is a proper subject of equitable relief in Courts of Equity in England.

Bean *vs.* Smith; 2 Mason, 252, 270.
Pratt *vs.* Nartham; 5 Mason, 95-105.
Gordon *vs.* Hobart; 2 Sumner, 401-403.
Fletcher *vs.* Morey; 2 Story, 555-567.
Robinson *vs.* Campbell; 3 Wheaton, 212.
United States *vs.* Howland; 4 Wheaton, 108.
Harrison *vs.* Rowan; 4 Wash. C. C. R., 202-204.
Mayor *vs.* Foulkrod; *Id.* 319-352.
Boyce's Executors *vs.* Grundy; 3 Peters, 210-215.
Foster *vs.* Swazey; 2 Woodb. and M., 217-221.
Newes *vs.* Scott; 13 Howard, 268-272.

2d. That although in England, Courts of Equity frequently send the parties to Courts of Law to settle their legal rights in patent, as in other cases, this is not done as matter of right with the parties, but in the sound discretion of the Court.

Bacon *vs.* Jones; 4 Myline & Craig, 432.
Wilson *vs.* Tindall; Webster's Pat. Cases, 730.
Machlin *vs.* Richardson; Ambler's R. 694.
Manley *vs.* Owen; 4 Burrows, 2329.
Wittingham *vs.* Wooler; Swanston R. 428.
Few *vs.* Guppy; 1 Myline and Craig, 487.
Hindmarch, *356, p. 216.
Bacon *vs.* Spottiswood; 1 Beavan, 381. Hindmarch, 356, p. 216.

3d. That the chancellor will use his discretion, whether he will hear and determine the facts of the case himself, or refer them to a master, or other skilful person, whom he may think peculiarly qualified to act as a master *pro hac vice*, to report thereon.

Gyles *vs.* Wilcox; 2 Atkins, 141.
Mathewson *vs.* Stockdale; 12 Ves., 270.

4th. That the practice in the Federal and State Courts of the United States, shows that sending parties to Courts of Law, to establish their legal rights, is in the exercise of a sound discretion with Courts of Equity, particularly in patent causes; perpetual injunctions having frequently been granted without previously trying the titles at law, the chancellor in some instances having actually refused issues to be tried at law.

The State of Pennsylvania vs. Wheeling and Belmont Bridge Company, 13 Howard, 567.

Miller and Steiger vs. Wack and Wife; Saxton's Chan. R., 204-215, and cases there cited.

Morse vs. Reed, decided by Chief Justice Ellsworth 1796, cited in the opinion of the Court, R. p. 81.

Whitney vs. Fort; decided in the U. S. Circuit Court, district of Georgia, 1806, cited in the opinion of the Court, R. p. 81.

Woodworth and Bunn vs. Benjamin, et al., 4 Howard, 712.

Goodyear vs. Day; decided by the New York Circuit Court, dist. of New Jersey.

French, et al. vs. Rogers, et al., Circuit Court, Eastern district of Pennsylvania.

Morse, et al. vs. O'Reilly; appeal to the Supreme Court of New York, from district of Kentucky.

Van Hook vs. Pendleton; 1 Blatchford, 187.

5th. That whatever may be the practice in England, the statutes justify, if they do not direct, a different practice in the Circuit Courts of the United States.

In England, the same judges do not, as here, sit at law and in equity, hence the chancellor by sending the parties to establish their legal rights at law, avoids the labor and responsibility of trying the complicated, and often difficult questions of law and fact, which generally arise in patent cases. And when the parties return, he may either act upon the faith of such decision, or simply revise the finding of the Court of Law, so far as it may be necessary, to enlighten his conscience, that he may do justice between the parties, according to the rules of equity. But not so with the Circuit Courts of the United States, which embrace law and equity

jurisdiction. Such reference in the Circuit Courts of the United States would be simply from one title to the other, thereby complicating and rendering the task more onerous. And although aided by a jury, when sitting at law, the Court would still be bound in good conscience, to set aside, or disregard the verdict, if contrary to equity, or to law and evidence.

Van Hook *vs.* Pendleton ; 1 Blatchford, 187-195.
Goodyear *vs.* Day, India rubber case, before cited.
2 Story's Equity Jurisprudence, § 934.
Hindmarch, *356, p. 216.

6th. That by reason of the difference, in the systems of granting patents in England and the United States, in the former country, the production of the letters patent is only evidence that the patentee has the grant; whilst in the latter, it is *prima facie* evidence, not only of the grant, but of the legal title to the invention claimed.

In England, as formerly in the United States, patents are granted, without any investigation on the part of the government, into the right of the party, to claim letters patent, the grant being made on the simple demand of the applicant, without even the sanction of an oath; and hence, the necessity of some confirming act, such as long and undisputed possession, or a trial at law, before a Court of Equity will interpose.

But under the existing patent acts of the United States, no grant of letters patent can be made without first testing the right of the party to have the grant. The law has created the office of commissioner of patents, with a corps of scientific experts, and all the necessary appliances for determining the novelty of alleged invention, sought to be patented, and has clothed this officer with the high and responsible trust of adjudicating the title of every applicant, to the grant of letters patent. And still further, to give sanction to such grants, and to guard against the abuse of that responsible trust, the law affords a remedy, to any party aggrieved, by

appeal and by bill in equity to the Federal Courts. So that for the sanction of long possession, or confirmation by trial at law, generally required in England, and formerly in the United States, before a Court of Equity will interfere, the existing statutes have substituted the trial before the commissioner of patents, with the supervision of the Federal Courts before the grant is made.

Hindmarch, section 6, p. 230.

Sections 7th, 8th, and 16th, Act of July 4th, 1836.

Sections 10th and 11th, Act of March 3d, 1839.

French, et al. *vs.* Rogers ; before cited.

Corning and Winslow *vs.* P. A. Burden ; decided Dec. Term, 1853.

7th. That the 17th section of the Act of July 4th, 1836, which established the change already pointed out in the system of granting patents for new inventions, provides: "That all actions, suits, controversies and cases arising under any law of the United States, granting, or confirming to inventors, the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law by the Circuit Courts of the United States, or any District Court having the powers and jurisdiction of a Circuit Court, which courts shall have power upon a bill in equity, filed by a party aggrieved in any such case, to grant injunctions, according to the course and principles of Courts of Equity, to prevent the violation of the rights of any inventor, as secured to him by any law of the United States, on such terms and conditions as said Courts may deem reasonable."

Thus original and complete jurisdiction, in patent causes, is conferred on the Circuit Courts in Equity. The power conferred is not merely to "grant injunctions according to the course and principles of Courts of Equity," but this power is conferred *in addition to the original and complete jurisdiction in all actions, suits, controversies and cases arising under any "law granting or confirming to inventors, the exclusive right to their inventions or discoveries."* And unless it can be shown that

this Act is unconstitutional, it must be conclusive as to the original and complete jurisdiction of Courts of Equity.

Allen *vs.* Blunt; 1 Blatchford, 480-486,

But that it was the intention of Congress to confer original and complete jurisdiction on Courts of Equity, in patent causes, and to introduce a radical change from the English practice, is manifested from the 16th section of the Act of July 4th, 1836, which confers jurisdiction on Courts of Equity for the repeal of patents, notwithstanding the practice in England, has been for the chancellor, on *scire facias* for the repeal of letters patent, to send the parties to a Court of law to settle the law and the facts, as preliminary to his action in confirming or repealing the letters patent.

Hindmarch, chapter 10, § 6.

8th. That Courts of law derive jurisdiction in patent causes alone, from the 17th section of the Act of 1836, which confers jurisdiction in the same terms on Courts of Equity, and if the terms be insufficient for the one, they must be for the other.

Allen *vs.* Blunt; 1 Blatchford, 480-486.

9th. That Courts of Equity are better suited to the adjudication of suits and controversies arising under letters patent for inventions, than Courts of law, because the grant is made for a limited term of years, and unless quickly enforced, no adequate remedy can be afforded before the expiration of the grant. The Courts of law can only afford redress for the past as against responsible parties, but cannot prevent a continuance of the wrong; and if the party infringing be not arrested in the wrong by the power of a Court of Equity, in the case of irresponsible infringers, the patentee would have no remedy.

10th. That the questions of law and fact are often so nicely blended that it is difficult to make a jury understand the

difference between the questions of fact which they are to decide, and the questions of law which they must take from the Court.

11th. Unlike cases relating to other kinds of property, which can only be enjoyed and possessed by one person, patent causes when presented to juries are, in most instances, to be determined by persons more or less interested in the issue, for on the failure of the patent, the invention vests in the public, and therefore juries are incidentally interested.

12th. The questions of fact are mainly dependent on the testimony of experts, which is often nicely balanced and contradictory, calling for the highest powers of discrimination, better suited to the cultivated and experienced judicial mind of a court, than of a mixed jury. And the danger of frequent disagreement of juries in causes so complicated and expensive, goes to confirm the wisdom of Congress in extending the jurisdiction of Courts of Equity to this class of causes.

13th. That every inventor, as every author, has a natural right to his invention or discovery.

Constitution of the United States ; Art 1, § 8.
Charter of Monopolies ; 21st James I.

The statute law does not create, but simply regulates the tenure of this species of property, and was enacted to "promote the progress of the useful arts," by "*securing to inventors the exclusive right to their inventions or discoveries, for a term of years, on condition that the particulars of such inventions or discoveries shall be fully communicated to the public!*"

The Act establishes an office to determine the sufficiency of the communication and the novelty of the alleged invention, and thereupon to grant, *not the invention, but the exclusive right* to work and enjoy it for a term of years. And after this communication has been made by the inventor, if the executive officer refuses to make the grant, he may invoke the power of a Court of Equity, to compel the making of

the grant. And if the grant has been made to another, he may file a bill for its repeal.

16th Section of the Act of July 4th, 1836.

10th and 11th Sections of Act of March 3d, 1839.

14th. That the inventor having yielded up his natural right in the secret of his invention, by divulging the particulars of it, under the promise of protection, he is entitled to the exercise of the highest equitable powers of the government to enforce the exclusive right for the term of the grant, to which the faith of the government is pledged.

QUESTION II.

If it be within the discretion of the court in such cases, to determine the issues, or to send the parties to the law side of the Court to have them tried, does an appeal lie to the Supreme Court of the United States, from the exercise of such discretion?

Under this question it will be contended on the part of appellee, that none but questions of law and fact can be appealed to the Supreme Court, and that the exercise of discretionary power by a Circuit Court is not matter for review on appeal.

Wylie vs. Coxe; 14 Howard, 1.

QUESTION III.

After a cause has been set down for final hearing on bill, answer and proofs, without any motion having been made for a trial at law, and, at the final hearing, the defendant offers no proofs in support of his answer and in reply to complainant's proofs, is he entitled as of right, to an order out of chancery, to try the questions at issue on the law side of the Court?

It will be contended on the part of the appellee that, under the most restricted rule of chancery practice, it was not competent for the Court in the cause at bar, to order issues at the final hearing for several reasons.

1st. This cause was set down for a final hearing on the pleadings, exhibits and proofs, without a previous order being moved for by either party, or made by the Court for issues to be tried by a jury.

2d. No evidence was introduced at the hearing by the appellant, to rebut the proofs of the complainant, and there was, therefore, nothing to send to a jury.

3d. The appellant, in his answer, admitted that the planing machine which he was using, was a "Gay machine," and this machine, or one like it (the Bicknell machine,) had before been judicially declared to be an infringement upon the Woodworth patent, and perpetually enjoined.

Wilson vs. Rousseau, et al. ; 4 Howard, 646.

Woodworth, et al. vs. Benjamin, et al. ; 4 Howard, 712.

4th. All the questions raised by the defendant's answer, against the validity of the patent had been repeatedly sub-

mitted to juries before, and verdicts found upon all of them in favor of the Woodworth patent.

Woodworth *vs.* Edwards; tried before Mr. Justice Woodbury, 1848.

Sloat *vs.* Spring, et al.; tried at Philadelphia, 1851.

Bloomer *vs.* McQuewan; at Pittsburgh, both tried before Mr. Justice Grier. Harding's R.

Van Hook *vs.* Pendleton; 1 Blatchford, 187.

QUESTION IV.

Have not Courts of Equity jurisdiction to suppress vexatious and multiplied litigation?

On the part of appellee, the affirmative of this question will be maintained, on the authority of

Mitford's Eq. P., 143, 4, 5.

2 Story's Eq. Juris., § 930, 31.

Van Hook *vs.* Pendleton; 1 Blatchford, 187, 195.

As letters patent secure to the patentee, the exclusive right to his invention only for a limited term of years, multiplied and undetermined litigation operates as a waste, for the value is in the enjoyment of the exclusive right during the limited term of the patent, and it is only by the interposition of the equity powers of the court, in arresting litigation that this waste can be prevented.

QUESTION V.

Is the decision of a Circuit Court of the United States refusing a motion to grant a re-hearing, matter for review on appeal?

The Court having heard a motion for a re-hearing after the final decree, and refused the motion, it will be contended on the part of appellee, that this was in the exercise of a sound discretion, which is not matter for review, on appeal to the Supreme Court.

Andrew Wylie, Jr. *vs.* R. S. Coxe, 14 Howard, 1.

The Supreme Court on appeal, will not review any order of the Court below, which is not in itself matter of appeal.

QUESTION VI.

What is the measure of compensation to which a successful complainant is entitled in an equity suit under the patent Acts?

It will be contended on the part of appellee,

1st. That as the Circuit Courts have complete and original jurisdiction of all actions, suits, controversies and cases arising under the Patent Acts, as well in equity as at law; (§ 17 Act of July 4th, 1836), the measure of damages which can be recovered at law, can be awarded in equity, except the penal award of treble damages, which by the 14th § of the same Act, is limited to verdicts in suits at law, for the reason that the extent of the injury sustained cannot be ascertained.

2d. That the grant of letters patent being in the nature of a contract to which the Government, on the one part, is bound to secure and protect the exclusive right during the term of the grant, as the consideration for the invention made and promulgated by the patentee, every infringement of that exclusive right, wrongfully withholds from the patentee a certain amount of gain, to which he is equitably entitled, and hence the profits which the patentee could have made but for the infringement by the defendant, is the true measure of compensation to which the complainant is entitled.

3d. That the policy of the Act is to secure to the patentee or his assignees, during the term of the grant, the entire proceeds of the invention, and as the infringement of letters patent is in its very nature, an act which may be secretly performed, and therefore beyond the reach of Courts of law, the act, consistent with itself, has conferred original and complete jurisdiction on the Courts of Equity; that, by their probing powers, they may compel the divulgence of the ex-

tent to which the infringement has been carried, as the basis to determine the extent of the injury or loss sustained by the complainant. But if the tribunal, which possesses the power to ascertain the injury sustained, does not possess the power to award the amount determined, then the Act is inconsistent with itself, and the power to determine is nugatory, which cannot be presumed of any statute.

4th. That, by any other construction, the provisions of the 17th § of the Act of July 4th, 1836, have no force or meaning, so far as they apply to Courts of Equity, for without these provisions, the equity powers of the Circuit Courts could be exercised as ancillary to Courts of law, in granting injunctions to prevent the further violation of the legal rights established by a Court of law.

5th. That if Courts of Equity cannot award to patentees the loss which they may have sustained, by the wrong acts of infringers, the provisions fall short of the intendment of the act as manifested by its title, which is: "to promote the progress of the useful arts," in conformity with the Constitution, "by securing for limited times to inventors, the exclusive right to their respective discoveries," which cannot be presumed of any statute, if its terms are susceptible of harmonious construction.

6th. That the authorities establish the principle, which is deducible by reason, from the very nature of the property and the grant, that the patentee shall be fairly compensated for all the injuries and losses which he can prove that he has sustained, by reason of the infringement.

Whittemore vs. Cutler; 1 Gallison, 482.

Pierson vs. Eagle Screw Co.; 3 Story, 410.

Curtis on Patents, § 251.

Hindmarch on patent privileges, *296, *297, p. 180-1; *261, p. 159.

Househill Co. vs. Neilson; *Webster's pat. cases*, 697, note r.

7th. That independently however of the provisions of the statute, the patentee in England, is recommended to seek compensation for losses sustained by the infringement of his

exclusive right, in a Court of Chancery, rather than in a Court of law.

Hindmarch *296, p. 180; *355, p. 216.

8th. That it must be observed, that the same language is used in the English authorities, in reference to what is characterized as damages, whether to be ascertained and awarded in equity or at law.

Hindmarch, *261, p. 159; *355, p. 215; *296, *297, p. 180-1.
Minter *vs.* Mower; Webster's pat. cases, 188.

9th. That counsel fees are not taxable as costs, but are claimed, and may be awarded as part of the loss sustained, by reason of the infringement, and the refusal of the infringer to desist from the use of the invention.

Phillips on patents, 447.

Curtis on patents, § 254.

Boston Manufacturing Co. *vs.* Fiske; 2 Mason 119, in which
Areamble *vs.* Wise-man, 3 Dallas, is overruled.

It will be further contended on the part of appellee, under the last question submitted, that the appeal merely brings up for review, the orders and decrees, or so much of them as the appellant contested at the Circuit, for he, and not the appellee is now in the attitude of complainant.

And that it is well settled law, that no decree by consent can be appealed, and as the decree was on the master's report, all that was not excepted, was decreed by consent.

C. R. BREWSTER,

C. M. KELLER,

of counsel for appellee.

INDEX.

ABATEMENT, PLEA IN.

Vide *Joint Contracts. Misnomer.*

ACTS OF THE LEGISLATURE.

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AMENDMENT.

Vide *Practice, 2.*

APPEAL.

Vide Practice, 5.

ASSIGNMENT.

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ATTACHMENT, FOREIGN AND DOMESTIC.

1. Domestic attachment against four partners issued on plaintiff's oath, that he had just grounds to "suppose and does verily believe that defendants intend to remove their effects." Three of the defendants, it clearly appeared, were out of the State. J. M., another defendant, left the State and went to Georgia, a few days before the attachment issued, declaring his intention to return, and leaving his baggage at the hotel where he boarded. On the day the attachment issued, he was in Georgia, and the defendants were then in the act of removing their goods. Motion to set aside the attachment, because the defendants were out of the State, refused. *Sloan vs. Anson Bangs & Co.*,..... 15
2. After publication for a year and a day of the usual rule to plead in cases of attachment, plaintiff obtained, on the 21st November, 1855, an interlocutory order for judgment. On the 22d January, 1856, defendant appeared before the clerk, and put in special bail to the action, and at the call of the case on the inquiry docket at the next term, moved to dissolve the attachment, and for leave to plead:—*Held*, that he was entitled to his motion. *Williams vs. Haselden*,. 55
3. A defendant in foreign attachment, against whom, at the expiration of the usual rule to appear and plead, an interlocutory order for judgment has been entered, may, nevertheless, by putting in special bail to the action before the next term after the order was entered, entitle himself to an order to have the attachment dissolved, and for leave to plead to the action,..... 1b.
4. A garnishee in foreign attachment is not entitled to set off the amount due by him to the absent debtor, against his liability as accommodation endorser of the absent debtor, on a promissory note not due when the writ in attachment was

served, although the garnishee, before making his return, and also before the note fell due, paid the note by substituting another in its place. *Martin vs. Solomons*,..... 533

Vide *Contracts*, 1, 2.

ATTORNEY AT LAW.

Vide *Evidence*, 6.

BAIL.

Vide *Contracts*, 8.

BASTARDY.

1. It is not necessary to a conviction of bastardy, where the information is given, not by the mother, but by a third party, that it should appear that the child is likely to become a burden to the district. *State vs. Crawford*,..... 361

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- 1 R. having agreed with C., to purchase from him, goods on credit, and give him security, drew his promissory note, payable to the order of C., and O. indorsed the same in blank. R. then delivered the note to the agent of C. and received the goods:—*Held*, that O. was liable as maker. *George W. Carpenter vs. Oaks*,..... 17
2. O. refused to indorse the note until he was advised by counsel, that he would not be responsible for R., but that he would be indorser for C. He, however, knew the purpose for which the note was to be used:—*Held*, that this did not affect his liability..... *Ib.*
3. C. indorsed the note in blank, but the indorsement was afterwards stricken out:—*Held*, that this did not prevent his recovery,..... *Ib.*
4. Where one, intending to become a party to the original contract, indorses a note payable to another, he is liable as maker..... *Ib.*
5. Where the payee and owner of a note payable to bearer died

intestate, and his distributees to avoid the expense of an administration, appointed agents to settle the estate, and delivered to them the note :—*Held*, that such agents could not sue on the notes in their own names; and that it was immaterial whether there were debts or not. *Richardson vs. Gower*,..... 109

6. The mere naked possession of a note payable to bearer does not authorize the party in possession to sue thereon in his own name,..... *Ib.*
7. J. O. was first endorser of a note in bank drawn by M., and W. L. and W. B. were second and third endorsers. The note in bank was taken up, and a note drawn by J. O., and endorsed by W. L. and W. B. substituted in its place. The bank, afterwards, recovered judgments against J. O., W. L., and W. B., on the note, and by arrangement among them, each paid a certain amount, and satisfaction was entered by the sheriff on the *fi. fas.*:—*Held*, that W. B. was not entitled to have the entry of satisfaction in the case against J. O. vacated, as made by mistake, and the *fi. fa.* enforced for his benefit. *Brunson vs. O'Conner*,..... 175
8. An administrator in Georgia cannot maintain an action in this State upon a note of his intestate, even though it be payable to bearer,..... *Ib.*
9. No one can be the bearer of a note which the payee or his legal representative has not transferred by delivery,..... *Ib.*

Vide Corporations, 4.

BLUE RIDGE RAILROAD COMPANY

Vide Statutes, 3.

BOND.

Vide Injunction Bond. Practice, 4.

BURNING.

Vide Criminal Law, 1, 2, 3.

CARRIERS.

Vide Common Carriers.

CASE, ACTION ON THE.

Vide Executors and Administrators, 1.

CATTLE.

Vide Railroads, 1, 2, 3, 5.

CHALLENGE.

1. A prisoner on trial for murder will not be allowed to withdraw a peremptory challenge in order to challenge for cause, where the prisoner's counsel ascertains from the juror upon his leaving the box, that there was a connection by marriage between the deceased and the juror. *State vs. Price*,..... 351

Vide Jury.

CHARLESTON.

Vide City Council of Charleston.

CHESTER, TOWN COUNCIL OF.

Vide Taxes, 1.

CITY COUNCIL OF CHARLESTON.

1. The City Council of Charleston have the power, under their charter, to subscribe to the stock of Railroad Companies, within and without the State, and to tax the inhabitants of the city, for the purpose of paying the subscriptions. *Copes vs. Charleston*,..... 491
2. The City Council of Charleston, having, at different times, subscribed to the stock of Railroad Companies, within and without the State, the legislature by an Act of 1854, con-

firmed all such subscriptions and declared them obligatory on the City Council :—*Held*, that the Act of 1854, was constitutional—and that no proceeding by *quo warranto*, in the name of the State, for the purpose of questioning the validity of such subscriptions, could afterwards be taken,..... *Ib.*

Vide Taxes, 2, 3.

CLERK, ENTRIES BY.

Vide Evidence, 2.

COMMERCE.

Vide Constitutional Law, 2.

COMMISSIONER IN EQUITY.

Vide Injunction Bond, 2, 3.

COMMISSIONERS OF ROADS.

Vide Road Law.

COMMISSION MERCHANT.

Vide Contracts, 3.

COMMISSIONS.

Vide Common Carriers, 4. *Wills and Testaments*, 8.

COMMISSION TO EXAMINE WITNESS.

Vide Evidence, 1, 3.

COMMON CARRIERS.

1. Where an insurance has been effected on goods shipped, the shipper may maintain an action against the carrier for damage done to the goods, notwithstanding the liability of

the insurer to him. Such is not like a case of double insurance; the carrier is primarily liable, and may be sued by the shipper, for the benefit of the insurer, even though the insurer has advanced the amount of damage. *Burnside vs. Steamboat Company*,..... 113

2. The Laurens Railroad Company gave receipts for cotton "to be delivered on presentation of this receipt at Charleston." The cotton reached the *terminus* of the Laurens Railroad in safety, and, there, without bulk being broken, was delivered in the same cars to the Greenville and Columbia Railroad to be carried on. It was afterwards lost:—*Held*, that the Laurens Railroad Company were liable—their undertaking being special, to carry to Charleston. *Kyle vs. Laurens Railroad Company*,..... 382
3. Where cotton is lost by a common carrier, interest upon its value may be assessed by the jury as part of the damages, in an action against the carrier for the loss,..... *Ib.*
4. In estimating the damages in an action against a carrier for the loss of cotton which he undertook to deliver to plaintiffs' factors in Charleston, the amount of factor's commissions upon the value should not be allowed the defendant, in abatement,..... *Ib.*

Vide Evidence, 4.

COMPENSATION.

Vide Navigable Stream, 2.

CONFESSION OF JUDGMENT.

Vide Sum. Pro.

CONSIDERATION.

Vide Covenant to stand seized to Uses, 2.

CONSOLIDATION OF ACTIONS.

Vide Practice, 3.

CONTRACTS.

1. Assumpsit by W. H. against S. M. for five hundred and ninety-one dollars, for hire of wagon, team and driver. Before suit commenced, a creditor of W. H. had issued an attachment against him in North Carolina, and S. M., being made garnishee, was condemned to pay two hundred and forty-seven dollars and ninety-nine cents. W. H. had also drawn an order on S. M. for one hundred and seventy-two dollars, which S. M., after suit commenced, accepted in writing:—*Held*, that the order and attachment were no bar to this action. *Harris vs. McNinch*,..... 35
2. *Held*, further, that the amount adjudged against S. M., in the attachment case, should be allowed as a discount..... *Id.*
3. Where a commission merchant sold goods for his principal, without disclosing his agency, and being indebted to the purchaser, gave him his due bill for the amount of his indebtedness:—*Held*, in an action by the owner for the price of the goods, that the purchaser could not set-off, or claim as payment the amount of the due bill. *Dortic vs. Jeffers, Cochrane & Co.*,..... 83
4. Action against the South Carolina Railroad Company as joint contractors with the Western and Atlantic Railroad Company and the Georgia Railroad Company for damage to cotton shipped, in November, 1852, at Chattanooga, and transported over the three roads to Charleston. In 1849, the South Carolina Railroad Company published a notice by which they made themselves liable as joint contractors with the other roads named. On the first October 1852, they published another notice, that they would be liable for damage to cotton "after it came into their possession, but no further." The receipt given by the Western and Atlantic Railroad Company, at Chattanooga, stated, that the cotton "was consigned to the Railroad agent at Augusta," for the plaintiffs in Charleston—"Roads liable for such injuries only as shall be established to have occurred while in their possession."—*Held*, that defendants were not liable as joint contractors, and non-suit ordered. *Bradford, Paton & Co. vs. Railroad Company*,..... 221
5. B. was indebted to S. his factor by book account, and S. was indebted in the same way, but in a smaller sum, to A. A.,

through B. her agent, directed S. to transfer the amount due her to B.'s credit, to which S. assented, but neglected to make the transfer on his books:—*Held*, that a transfer on the books was not necessary to the completeness of the transaction—that, by the agreement and assent of the parties, the indebtedness of S. to A. was *ipso facto* extinguished, and, *pro tanto*, the indebtedness of B. to S. *Martin vs. Manner*,..... 271

6. Under a written contract, dated 17th January, 1853, to purchase land at a fixed price no time of payment being specified, purchaser entered, and in 1854 or 1855, vendor gave notice to quit—the purchase money being unpaid—and then brought trespass to try title:—*Held*, that what was reasonable time for payment of the purchase money was a question for the jury; and that question having been submitted to them their verdict for defendant was not disturbed. *Hays vs. Hays*,..... 419

7. P. assigned goods to M. to cover his liabilities to the firm of M. & M. and to M. M. allowed the goods to be taken by W., another creditor of P.:—*Held*, that M. had no right so to dispose of the goods, and that he was liable to P. for the value. *Price vs. Moses*,..... 454

8. M. was bail for P. to W.:—*Held*, that, because of his contingent and possible liability as bail, he had no right to retain the goods, or their value, to meet that liability,..... *Ib.*

Vide *Covenant. Joint Contracts. Railroads*, 8, 10.

CONSTITUTIONAL LAW.

1. An Act of 1854, imposed a tax on "the amount of sales of wares, and merchandise," &c.:—*Held*, that where the sales were of goods brought from other States and sold by the importer in the original packages, they were nevertheless liable to the tax—not being exempt from State taxation by any provision of the Constitution of the United States. *State vs. Pinckney*, 474

2. So long as Congress forbears to exercise the constitutional power to regulate commerce among the several States, each State may, for itself, and within its own limits, regulate such commerce,..... *Ib.*
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3. In the clause of the Constitution prohibiting a State from laying duties on imports, the term imports embraces only articles from foreign nations subject to the payment of duties to the United States, and not merchandise carried from one State to another,..... *Id.*
 4. Imports are exempt from State taxation only so long as they remain the property of the importer in his warehouse, in the forms or packages in which imported. When the packages are sold, or broken up, and the goods mixed with the general mass of State property, they are not protected from State taxation. So also, it seems, a tax upon the importer, estimated by the amount of his sales, is not unconstitutional, even though his sales embrace imported articles. *Id.*
- Vide *City Council of Charleston. Jury, 2. Taxes, 3.*

COPARTNERSHIP.

Vide *Partnership.*

CORPORATIONS.

1. Where the charter of an incorporated Company declared that nothing therein contained should exempt the members "from all liabilities pertaining to general partners:"—*Held*, That the members were liable to creditors of the Company, as partners, and might be sued as such, under the corporate name. *Bank vs. Bivingsville Cotton Manufacturing Co.,...* 95
- The appointment of an agent with authority to bind the corporation, may be implied from the acts of the Company, and need not be under seal,..... *Id.*
3. Where the members of a corporation are, by their charter, liable as general partners, the Company is bound by the act of a member, acting within the scope of the business of the corporation, as in the case of an ordinary firm:—*Semble,* *Id.*
 4. The members of an incorporated Company being liable, by their charter, as general partners, L., the acting member, who did all the business of the Company, drew a bill of exchange in his own name, styling himself agent of the Company. In an action against the members in the corporate name charging them as drawers, the plaintiff was non-suited. On ap-

peal, *held*, That it should have been submitted to the jury to determine, whether L. drew the bill as the authorized agent of the Company, or in his character as partner,..... *Id.*

COSTS.

Vide Insolvent Debtors' and Prison Bounds' Acts, 2.

COUSIN.

Vide Covenant to Stand Seized to Uses.

COVENANT.

1. The principal to a bond had given a mortgage of land to the obligee to secure the payment of the bond, and a bill in Equity was pending against the principal and M., his surety, to foreclose. B. and C. reciting that they were purchasers of the land, bound themselves, by sealed instrument, to M., the surety, 'to exonerate, discharge, and indemnify him, from and against any and all liability to pay the mortgage, or any part thereof, or any cost or expense thereon. And we hereby covenant and agree to take the place and stand in the shoes of the said M., and obligate ourselves, jointly and severally, to him, to repay and refund to him whatever amount he may have to pay on said bond and mortgage. And for the faithful performance of this covenant and obligation, we hereby, jointly and severally, bind ourselves to the said M., in double the amount that he may be called on and required to pay in the case,' then pending in Equity. A decree for foreclosure was afterwards rendered on the bill then pending: The land was ordered to be sold, and, at the sale, it was purchased by B., for a sum much less than M's. liability on the bond:—*Held*, that the covenant of B. and C., was not one of indemnity against the mere liability of M., on the bond, but was one of indemnity against loss or damage by reason of that liability,—that, therefore, M., could maintain no action against B. and C., until he had paid money on the bond. *McDonald vs. Bauskett & Carroll*, 178

COVENANT TO STAND SEIZED TO USES.

1. E. M. in consideration of natural love and affection, gave,

granted, bargained and sold, a tract of land to his cousin, in fee, reserving the use to himself for life :—*Held*, that the deed was good as a covenant to stand seized to uses. *Dinkins vs. Samuel*,..... 66

2. The relationship of cousin is sufficient to sustain a covenant to stand seized to uses,..... *Ib.*

CRIMINAL LAW.

1. One who *wilfully* sets fire to his neighbor's grass or fence, may be indicted under the Act of 1789, § 5, 5 Stat. 125. *State vs. Lewis*,..... 20
2. Under the statute 22 and 23 Car. 2, c. 7, which provides, that "if any person shall, in the night time, maliciously, unlawfully, and willingly *burn*, or *cause to be burnt* or *destroyed*, any ricks, &c., barns, or other houses or buildings," &c., the injury, to come within the meaning of the statute, must amount, either to a total demolition of the building, or be such as unfits it for the purpose for which it was erected. *State vs. De Bruhl*,..... 23
3. To burn, destroy or suppress a will, is not an indictable offence. *O'Hanlon vs. Myers*,..... 128
4. Indictment for hog stealing charged, that the offence was committed in January, 1851. General issue pleaded, and evidence offered, that the offence was committed in January, 1856 :—*Held*, that such evidence was receivable; that it was not necessary to prove the time, as laid, and that the prosecution was not barred by the statute of limitations. *State vs. Porter*,..... 143
5. An indictment for grand larceny, alleging that the goods are the property of A. is not sustained by proof that they are owned jointly by A. B. and C. *State vs. Owens*,..... 169
6. Under the Act of 1731, § 43, a prisoner, indicted for a capital offence, is entitled if he requires it, and upon payment of the fees for copying, to a copy of the indictment three days before his trial. The demand for a copy should be made, at the latest, when he is arraigned, and in open Court. *State vs. Winningham & Miller*,..... 257
7. W., one of five prisoners jointly indicted for murder, upon their arraignment on Thursday, the term being only for a

week, said that he was not ready for trial, and insisted upon a continuance, on the ground that he was entitled to a copy of the indictment three days before the trial. His motion to continue was refused, and the five were tried on Friday and W. and M., were found guilty and the rest acquitted:—On appeal, *held*, that what W. did, amounted to a demand of a copy of the indictment, and that he was entitled to a new trial *ex debito justiciæ*,..... *Ib.*

8. M., when arraigned made no motion to continue, but moved for and obtained a bench warrant for some witnesses. On Friday he united with W., and the other prisoners in moving for a continuance, on the same ground W. had taken the day before:—*Held*, that M. had waived his right to a copy of the indictment, but, nevertheless, the Court, under the circumstances, granted him a new trial, *ex gratia*, *Ib.*

Vide Bastardy. Challenge. Jury. Manslaughter. Peddling. Perjury.

DAMAGES.

Vide Common Carriers, 3, 4. Covenant. Injunction, 1. Insolvent Debtors' and Prison Bounds' Acts, 2. Practice, 4. Set off.

DECEIT.

Vide Fraud, 3, 5. Principal and Agent, 2, 4.

DEEDS.

1. Deeds intended to operate one way may operate another, if the intention to pass an estate cannot otherwise be subverted.
Dinkins vs. Samuel,..... 66

Vide Covenant to Stand Seized to Uses. Sheriff's Deed. Slaves.

DEMURRER.

Vide Pleading, 3, 4. Practice, 1, 2.

DISCOUNT.

Vide Contracts, 2. Set off.

DOG.

Vide Railroads, 1.

DOMESTIC ATTACHMENT.

Vide Attachment, Foreign and Domestic, 1.

DOWER.

1. At a sale of the personal property of an intestate, his widow and her second husband purchased to a small amount, and gave the administrator a receipt for that amount, as her distributive share. The debts were sufficient to consume the whole personal estate, and were afterwards paid by a sale of the lands:—*Held*, that the widow was not barred of her dower, the personalty being the primary fund for the payment of debts, and there being no personal estate to distribute. *Floyd vs. Hodge*,..... 157

DRUNKENNESS.

Vide Slander, 1. Statutes, 1, 2.

DUTIES.

Vide Constitutional Law, 3.

EMANCIPATION.

Vide Slaves. Wills and Testaments, 2, 4.

ESTOPPEL.

Vide City Council of Charleston, 2. Misnomer. Sheriff's Deed, 1, 3.

EVIDENCE.

1. An answer of a witness to one of the plaintiff's interrogatories in chief was excluded, because it appeared, that there was written evidence of the matter testified to, which was not produced:—*Held*, that the plaintiff might read, as evidence, the answer of the same witness to a cross-interrogatory, in which he repeated the testimony given in answer to the excluded interrogatory in chief. *Wolfe vs. Sharp*,..... 60

2. At an administrator's sale, made by leave of the Ordinary, an entry made by his clerk, in conformity to the result announced by the cryer, in the presence and hearing of all parties, is sufficient to charge the purchaser,..... 16.
 3. Action against a common carrier for damage to cotton. J. W. was examined by commission, as a witness for plaintiff. By agreement, he was to share with plaintiff the profits and losses of the shipment, but had assigned and released his interest to plaintiff. When the assignment was produced, the objection to J. W.'s competency was waived, and his testimony was read. When the evidence in the case was closed, the circuit judge declined to rule out J. W.'s testimony, as incompetent:—*Held*, that his ruling was proper. *Burnside vs. Steamboat Co.*,..... 113
 4. On receipts of the W. & A. Railroad Company, in Georgia, for twelve bales of cotton consigned to B. & S. in Charleston, and proof that the South Carolina Railroad Company usually received cotton sent as this was, and delivered it on such receipts in Charleston, B. & S. sought to charge the South Carolina Railroad Company for the twelve bales, alleging that they were lost:—*Held*, that the proof was insufficient,—there being no evidence at all that the cotton ever came into the possession of the last named Company. *Railroad Co. vs. Bradford & Sanders*,..... 207
 5. A miller's books of account may be given in evidence, to prove an account for meal delivered. *Exum vs Davis*,..... 357
 6. An attorney is not an incompetent witness for his client, because of his interest in the costs. It is proper, however, that before being examined, he should withdraw from the management of the case, have another attorney substituted in his place, and release his possible right to costs. *Price vs. Moses*,..... 454
- Vide *Criminal Law*, 4, 5. *Legitimacy*. *New Trial*, 2. *Partnership*. *Perjury*, 6. *Principal and Agent*, 1. *Sureties*, 1. *Warranty*.

EXECUTORS AND ADMINISTRATORS.

1. For damage to the land of their intestate, in his life time, by damming the water in a stream and backing it on the intes-

tate's land, case cannot be maintained by the administrators.
Chalk vs. McAlily,..... 91

2. In an action by a father against the administrators of his son for slaves which the father had allowed to go into, and remain in, the possession of the son, the administrators cannot show the son's insolvency, in order to defeat the action for the benefit of creditors. *Tomlinson vs. Tomlinson*, 404

Vide *Bills of Exchange and Promissory Notes*, 8. *Evidence*, 2.
Slaves. Wills and Testaments, 6, 7, 8.

FELONY.

Vide *Challenge. Criminal Law*, 6, 7, 8. *Jury. Manslaughter*.

FEMALE.

Vide *Pleading*, 1, 2.

FENCE.

Vide *Criminal Law*; 1. *Railroads*, 2.

FINE.

Vide *Road Law*, 2.

FIXTURES.

1. Under a sale to foreclose a mortgage, C. M. became the purchaser of a house and lot, and a few days afterwards the sheriff under executions against the mortgagor removed and sold certain gas chandeliers and a pendant gas burner, which were attached by screws to a small pipe, (that conveyed gas into the house) and which could be detached without any escape of gas or injury to the pipe, or any part of the building:—*Held*, that as between C. M. and the sheriff, the chandeliers and gas burner were not fixtures, which passed to C. M., as purchaser, under the sale to foreclose the mortgage. *Montague vs. Dent*,..... 135

FOREIGN ATTACHMENT.

Vide *Attachment, Foreign and Domestic*, 2, 3, 4.

FRAUD.

1. Where, after a sale, the consideration of which is the vendor's antecedent indebtedness to the vendee, the vendor retains possession of the slave sold, under a stipulation to pay hire, such stipulation takes the case from within the rule of *Smith vs. Henry*, 1 Hill, 16, and the question of fraud is one of fact for the jury to decide. *Pringle vs. Rhame*,..... 72
 2. A. sent to C., a druggist, certain boxes of medicine, to be sold on commission. C. failed and assigned his stock of drugs, including A.'s medicines, to H. a creditor, and H. sold them to M. In trover by A. against M.:—*Held*, that although H., who paid no money, but whose assignment was in consideration of the indebtedness to him, could not have been protected had he been sued, yet that, if A., by his conduct, enabled C. to hold himself out as the true owner to the deceit of those who dealt with him, and if M., who paid money, was really deceived by the appearances, A. could not recover against him. *Ayer vs. Mordecai*,..... 287
 3. New trial ordered that the case might be submitted to the jury with proper instructions,..... *Ib.*
 4. C. in order to induce H. to do the draying business of a firm of which C. was a member, assured him that he should have all the business of the firm, and that he would have as much as he could do for a year or two. H., thus assured, undertook the business, and incurred considerable expense in purchasing slaves, horses, drays, &c. In about five months the firm was dissolved and a new one formed, of which C. was not a member. The new firm gave their business to another: Whereupon H. brought an action on the case against C. for the loss he had sustained by reason of the false representation as to the time he was to have the business. Non-suit ordered, there being nothing in the evidence showing that C's declarations were not made in entire good faith. *Holmes vs. Caldwell*,..... 311
 5. A question of fraud as to chilling the bidding at a sheriff's sale, is one for the jury to decide. *Manning vs. Dove*,..... 395
- Vide *Executors and Administrators*, 2. *Insolvent Debtors' and Prison Bounds' Acts*, 1, 4, 5, 6. *Principal and Agent*, 3, 4, 5. *Wills and Testaments*, 5.

FRAUDS, STATUTE OF

Vide *Evidence*, 2.

GARNISHEE.

Vide *Attachment, Foreign and Domestic*, 4

GIFT.

Vide *Executors and Administrators*, 2. *Slaves*.

GUARANTY.

1. M. wrote to L. & Co. :—Mr. B. informs me, that, in a conversation with Mr. S. of your firm, he stated to B. 'if he would get me to be responsible for him to you, or in other words to give B. a letter of credit to you, he would sell him on longer time, say nine months or one year. This is therefore to inform you that I will be responsible for B. to the amount of one thousand dollars':—*Held*, to be a continuing guaranty until goods to the amount of one thousand dollars were purchased, but no longer. *Lawton vs. Maner*,..... 323
2. The goods were purchased from time to time, in separate parcels, and for each parcel B's note was taken at six months:—*Held*, that the taking of notes was no waiver of the right to resort to M.; and that it was not a condition of the guaranty that at least nine months credit should be given to B.,..... *Ib.*
3. M. was *held*, not to be liable for interest,..... *Ib.*
4. On a continuing guaranty given and accepted in 1847, loans were made from time to time, and there was no default in payment, all previous notes for loans having been met when due. until September, 1852, when default was made in payment of certain notes given for advances made a short time before:—*Held*, that the statute of limitations did not commence to run in favor of guarantor until default of payment was made. *Bank vs. Knotts*,..... 543
5. Unless neglect to give notice of principal's failure to pay, produce some loss or prejudice to guarantor, such neglect is no defence to an action on the guaranty,..... *Ib.*

HIGHWAYS.

Vide Pleading, 3, 4. Road Law.

HOG STEALING.

Vide Criminal Law, 4.

HOMESTEAD LAW.

1. Where a defendant takes no step towards availing himself of the benefit of the homestead law before levy and sale of his land, it is doubtful if he can do so afterwards. *Manning vs. Dove*,..... 395

IMPORTS.

Vide Constitutional Law, 1, 3, 4.

INDEMNITY.

Vide Covenant.

INDICTMENT.

Vide Bastardy. Criminal Law. Manslaughter. Peddling. Perjury.

INJUNCTION BOND.

1. In an action upon a bond, given by a plaintiff in Equity, in order to procure an injunction to stay a suit at law, it may be alleged and shown as a breach of the condition of the bond, that, by reason of the delay in obtaining judgment and execution, occasioned by the injunction, the property of the defendant, in the suit at law, was so wasted, sold, encumbered and disposed of, that the plaintiff lost his debt. *Tryon vs. Robenson*,..... 160
2. Special injunction requiring defendant in Equity to give bond not to remove a slave, &c., granted by Commissioner, upon

condition that plaintiff in Equity give bond to pay all damages defendant might sustain in case of plaintiff's failure in his bill:—*Held*, that the bond given by plaintiff was void—the Commissioner having no authority to require him to give such bond. *Fant vs. Martin*,..... 428

3. The only case in which a Commissioner can require a plaintiff, applying for an injunction, to give bond, is where the application is for an injunction to stay execution or suit at law,. *Ib.*

INNKEEPER.

1. Where several, as a father and his two daughters, come in company and put up at an inn, the goods of one cannot be detained for the board of all, but only for his or her own proportion. *Clayton vs. Butterfield*,..... 300
2. Where a father and his two daughters put up at an inn, and the board of all is charged to the father, and he is sued for it, and, being held to bail, takes the benefit of the Insolvent Debtors' Act, the landlord has no lien upon the trunk of one of the daughters, for the board due him,..... *Ib.*

INSOLVENT DEBTORS' AND PRISON BOUNDS' ACTS.

1. Upon a suggestion under the Insolvent Debtors' Act, the jury found, that the applicant, with the intention of securing a benefit to himself by retaining possession of his estate, had fraudulently, and without consideration, assigned his whole personal estate, and had since remained in possession and used and enjoyed the assigned effects as his own:—*Held*, in an action on the prison bounds' bond, that such verdict was substantially a finding that the schedule (which did not include the assigned effects) was false. *Brandon & Nethers vs. Rogers*,..... 9
2. In an action upon a prison bounds' bond, the costs of a suggestion, upon which the application for a discharge had been successfully resisted, cannot be recovered..... *Ib.*
3. Where a debtor, who has been arrested under *ca. sa.*, given bond for the prison rules, filed his schedule and made application for the benefit of the Insolvent Debtors' Act, is arrested under another *ca. sa.*, and gives bond for the prison rules, he need not file a schedule in the second case, but his

- schedule under the first bond, answers for both, and there is no breach of the second bond. *Banks vs. Ingram*,..... 28
4. Where an applicant for the benefit of the insolvent debtors' Acts, who is at large under bond to keep the prison rules, has been convicted of fraud, it is proper for the circuit judge to hear and determine a motion for his re-arrest. *Mack & Smith vs. Garrott*,..... 79
5. Such motion may be made, either at the term when the defendant was convicted, or at a subsequent term,..... *Ib.*
6. If made at a subsequent term, the defendant should, it seems, have reasonable notice of the motion,..... *Ib.*
7. There are cases where the defendant may be convicted and retaken, and yet the condition of the bond not be broken., *Ib.*
8. In all cases the bond continues until the defendant is discharged or retaken,..... *Ib.*
9. In an action upon a prison bounds' bond to a plea of performance, plaintiff replied, that the applicant had gone beyond the rules; and defendant rejoined, that the goods of the applicant were out of the district, and that the applicant was compelled to leave the bounds to deliver them:—*Held*, on demurrer, that the rejoinder was bad. *Walker vs. Riley*, 87
10. An applicant for the benefit of the prison bounds' Act, is bound to make actual delivery of the goods to his assignee, or do that which is equivalent thereto; a mere readiness and willingness to deliver is not enough,..... *Ib.*
11. The decisions have firmly established that the *undue preference* forbidden by the prison bounds' Act, includes the idea of a fraudulent preference,..... 234
- Where a debtor, knowing his insolvency, assigns his estate to some creditors in preference to others, it amounts to an undue preference. *McKenzie, Cadow & Co. vs. Garrison*,.. *Ib.*
12. Whether a prisoner shall be required to specify the names of witnesses to choses in action included in his schedule, is a matter, it seems, for the determination of the commissioner of special bail,..... *Ib.*

INSURANCE.

1. To a valued policy of insurance against fire, on a "stock of goods and merchandize contained in" plaintiff's store, one of the conditions was that "the keeping of gunpowder for sale or on storage, upon or in the premises insured, shall render the policy void:"—*Held*, that the keeping of small quantities of gunpowder in kegs as part of the stock of goods kept for sale did not vitiate the policy. *Leggett vs. Insurance Company*,..... 202
2. Amongst the stipulations of the policy was one, that in case the above mentioned building shall at any time, "be appropriated, applied, or used for the purpose of storing or vending therein" certain enumerated articles, "then, so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no force or effect:"—*Held*, that plaintiff was entitled to recover for a loss by fire of the goods and merchandize insured, although it appeared that a barrel of oil had been temporarily left in a back room of the store, and that near it were some bunches of cotton yarn,..... *Ib.*
3. It was part of one of the conditions of the policy that, "if after insurance is effected, the risk shall be increased by any means within the control of the assured, such insurance shall be void and of no effect":—*Held*, that the increase of risk contemplated was by something permanent or habitual," *Ib.*

Vide *Common Carriers*, 1.

INTEREST.

1. In a suit brought to recover the difference between the amount bid, at a sale by an administrator, and the amount for which the property was re-sold, the purchaser having failed to comply with the terms of the first sale, interest *eo nomine* may be recovered—the conditions of the sale being in writing. *Wolfe vs. Sharp*,..... 60

Vide *Common Carriers*, 3. *Guaranty*, 3. *Practice*, 4.

JOINT CONTRACTS.

1. In assumpsit on open account, the non-joinder of a joint con-

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tractor, who should have been made a defendant, can only be taken advantage of by plea in abatement. *Exum vs. Davis*,..... 357

2. Where one of two joint contractors is sued on an open account, plaintiff's books of account,—defendant not having objected to the non-joinder by plea in abatement,—may be given in evidence, and, although they show a joint liability, plaintiff is entitled, it seems, to recover the whole amount,..... *Ib.*

Vide Contracts, 4.

JUDGMENT.

Vide Payment. Sum. Pro.

JUDGMENT NON OBSTANTE VEREDICTO.

Vide Practice, 4, 5.

JURISDICTION.

Vide Road Law, 2.

JURY.

1. The decision of a circuit Judge directing a jury to be organized for the trial of a capital offence, according to the late rule of Court, approved of. *State vs. Price*,..... 351
2. The Rule of Court (97th) adopted November, 1856, directing the mode in which a jury shall be formed for the trial of a prisoner, where the right of peremptory challenge is claimed and allowed, does not violate any provision of the Constitution or Act of the Legislature. The mode of forming a jury in such case, was regulated entirely by practice, and it was competent for the Court to alter the practice and adopt the rule. *State vs. Boatwright*,..... 407

Vide Challenge. New Trial, 1, 2. Practice, 6.

LANDLORD AND TENANT.

Vide Contracts, 6.

LARCENY.

Vide Criminal Law, 5.

LEGITIMACY.

1. Slight evidence *held* insufficient to rebut the presumption of legitimacy—the party charged to have been illegitimate being dead, and his father and mother having also, been long since dead. *Dinkins v. Samuel*,..... 66

LEVY.

Vide Sheriff's Deed.

LIEN.

Vide Innkeeper.

LIMITATIONS, STATUTE OF.

Vide Criminal Law, 4. Guaranty.

MANSLAUGHTER.

1. In charging the jury, in reference to a voluntary homicide, effected by a deadly weapon, the Judge defined manslaughter to be, "homicide committed in sudden heat and passion and on *sufficient legal provocation*," and again he said, "It is not every killing in passion that the law mitigates down to manslaughter; it must be passion *justly excited by legal provocation*." The jury found the prisoner guilty of manslaughter, and on appeal, *held*, that the terms used to characterise manslaughter were suitable and proper. *State vs. Smith*,..... 341

MARKET OVERT.

Vide Purchaser.

MILLER'S BOOK.

Vide Evidence, 5.

MISNOMER.

1. Upon a note payable to the plaintiff, in which only the initials of his Christian name were given, he sued, giving, for his Christian name, such initials :—*Held*, that defendant could not plead the misnomer in abatement; that he was estopped by his admission in writing, from denying that such initial letters formed the Christian name of the plaintiff. *Woodberry vs. Dye*,.....

MISTAKE.

Vide *Bills of Exchange and Promissory Notes*, 7. *Railroads*, 10.
Sureties, 2.

MURDER.

Vide *Criminal Law*, 7, 8, 9. *New Trial*, 2.

NAVIGABLE STREAM.

1. Pond Branch is a navigable stream under the Act of 1853. *Will vs. Jeffcoat*,..... 389
2. Where the owner of a mill-dam erected on a stream made navigable by the Act of 1853, allows one to pass rafts of timber through his dam and slope, he cannot maintain an action at common law to recover compensation. To obtain compensation the provisions of the Act must be pursued,.. *Id.*

NEGLIGENCE.

Vide *Railroads*, 1, 3, 4, 5, 7.

NEW TRIAL.

1. The affidavit of a juror imputing misconduct to himself and his fellows in the jury room, will not be heard on a motion for a new trial. *State vs. Tindal*,..... 212
2. Defendant was convicted of murder and moved for a new trial on the ground that testimony taken at the inquest being in
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the record, was accidentally in the jury room during their deliberations :—Motion refused, it not appearing, by competent evidence, that the testimony was read by the jury, and the Court thinking, that, if read, it added nothing to the strength of the evidence given before the jury. *Ib.*

3. New trial ordered upon a question of fact—the verdict having nothing to sustain it, and being therefore capricious.
McNair vs. Railroad Company,..... 284
4. The inadvertent omission by the Judge to say any thing about the prisoner's character, which was proved to be good, and relied upon in the defence, is no ground for a new trial.
State vs. Smith,..... 341
5. Discrepancies between the testimony of witnesses for the State, as given on the trial, and their testimony, as carefully taken in writing by the coroner at the inquest and signed by them, were relied on to discredit the witnesses :—*Held*, to be no ground for a new trial, that the Judge, in adverting to this matter, said to the jury, that "evidence was often loosely taken, and perhaps no very great weight should be given to these discrepancies,"..... *Ib.*

Vide *Criminal Law*, 7, 8. *Fraud*, 3.

NON-JOINDER.

Vide *Joint Contracts*.

NOTICE.

Vide *Guaranty*, 5. *Principal and Agent*, 1.

ORDINARY.

Vide *Sureties*, 2.

PARENT AND CHILD.

Vide *Executors and Administrators*, 2.

PARTNERS.

Vide *Attachment, Foreign and Domestic*, 1. *Corporations*.

PARTNERSHIP.

1. Action against both partners, on a single bill executed by one partner in the name of the firm :—*Held*, that it was admissible to show the consideration of the single bill and the course of dealing of the partners in reference to other single bills, in order to raise the inference, that authority to execute the bill sued on had been given. *Fant vs. West*,..... 149

Vide Corporations. Sheriff, 2.

PAYMENT.

1. On a sealed note given by F., principal, and G., surety, separate actions were brought, one against F. and the other against the administrators of G. F. failed to appear, and judgment against him for the whole amount, principal and interest, was recovered. In the other action, only the principal sum, without interest or costs, was recovered, usury having been successfully pleaded :—*Held*, That payment of the judgment against the administrators of G. was satisfaction *pro tanto* only and not in full, of the judgment against F. *Lumpkin vs. Ferguson*, 424
2. Where separate actions are brought on the same demand against A. and B., each equally liable for the whole, and judgment for the full amount is recovered against A., who makes no defence, while B.'s defence, going to part of the demand, is successful, and the judgment against him is for a smaller sum, satisfaction of the judgment against B. is no more satisfaction in full of the judgment against A. than a failure to recover altogether against B. would have extinguished the judgment against A.,..... *Id.*

Vide Contracts, 5.

PEDDLING.

1. An indictment for peddling, which simply charged, "that A. P. on, &c., at, &c., did sell and expose to sale divers goods, wares, and merchandise, the said A. P. then and there being a pedler, and not having obtained a lawful license," &c. :—*Held* bad, and judgment thereon arrested. *State vs. Powell*, 373

PENALTY.

Vide *Practice*, 6.

PERJURY.

1. Where an indictment sufficiently charges a common law perjury, its conclusion, *contra formam statuti*, may be rejected as surplusage. *State vs. Kennerly*,..... 152
2. By the common law the oath must be material or it will not amount to perjury; and the rule is the same, it seems, under the Act of 1833,..... *Ib.*
3. Where the indictment alleges the oath to have been material, the materiality must be proved,..... *Ib.*
4. In an indictment for perjury, it is enough to allege, that the defendant was "duly sworn," &c.: it is not necessary to allege, that the oath was taken on the Gospel of God, or Holy Bible, or according to the ceremonies of any particular religion. *State vs. Farrow*,..... 165
5. The indictment need not allege, that the court at which the oath was taken, had jurisdiction of the subject matter of the suit, or of the discount—it is sufficient to allege, that the action, to which the discount was set up, was by summary process,..... *Ib.*
6. In an indictment for perjury, the prosecutor, unless he has a direct, certain and immediate interest in the record, is a competent witness,..... *Ib.*

PLEADING.

1. Where a female brings an action of slander for saying of her that she is the mother of a mulatto child, she need not aver in her declaration that she is unmarried, or that she is married to a white man, or that she is a white woman. *Smith Hamilton*,..... 44
2. Where a female sues in her own name, the defendant by pleading the general issue, admits her to be a *feme sole*; and a plaintiff need not aver herself to be white, for that the law presumes,..... *Ib.*

3. In trespass *quare clausum fregit* defendant justified because of a "private path," setting forth no *termini*, and plaintiff demurred generally:—*Held*, that if the plea was defective because the *termini* were not given, such defect was matter of form, and the demurrer should have been special. *Ellison vs. Aiken*, 369
 4. In a plea of justification to a civil action, the *termini* of a "private path," which in this State is a public way, need not be given, *Ib.*
 5. After judgment overruling a general demurrer, leave to plead over will not be given, *Ib.*
- Vide *Attachment, Foreign and Domestic*, 2, 3. *Joint Contracts. Pleading* 2, 3. *Slander*, 3, 4.

PRACTICE.

1. To plaintiff's declaration, defendant filed a demurrer, on 2d October, 1855. On 11th October, 1856, plaintiff moved, that the case be put on the issue docket. A joinder in demurrer, without date, and which never had been filed, was exhibited:—*Held*, that plaintiff's motion was too late, a year and a day having elapsed, since any step was taken in the cause. *Thomson vs. Goudelock*, 49
2. After judgment on demurrer, a motion to amend cannot be allowed. *Chalk vs. McAuley*, 92
3. A motion to consolidate is addressed to the discretion of the Court, and should properly be made after declaration and before plea, though if the causes of action are admitted, or certainly ascertained by affidavits, it may be made, it seems, at the return term of the writ. *Worthy vs. Chalk*, 141
4. Where in debt on bond, the jury, in finding for the plaintiff on the general issue, assess the damages, as under our practice is proper, and allow the plaintiff only the principal sum due, but not the interest, to which he is also entitled, his only remedy is by appeal. Judgment for the interest *non obstante veredicto*, will not be allowed, nor can he collect it by marking it for collection on the *fi. fa.* *Gourdin vs. Read*, 217
5. Where, by not giving notice in time, a plaintiff has lost the right of appeal from the verdict, he cannot on his appeal

from the decision of a Judge refusing a motion for leave to enter up judgment *non obstante veredicto*, move for a new trial,..... *Id.*

6. A penalty not exceeding twenty dollars, for violation of an Ordinance of the city of Charleston, may be recovered before the Recorder, without the aid of a jury, although the defendant demand one. *City Council vs. Stelges*,..... 438

Vide *Attachment, Foreign and Domestic*, 1, 2, 3. *Challenge. Criminal Law*, 6. *Evidence*, 1. *Jury. Pleading*, 5. *Sum. Pro. Writs*.

PRINCIPAL AND AGENT.

1. Where, in trover against the Sheriff for levying, under foreign attachments, a steam boat claimed by the plaintiffs as assignees of the absent debtor, the question was, whether the attaching creditors had notice of the assignment:—*Held*, that notice to their agent was notice to them, and that the agent's declarations at the time of levying the attachments were admissible as evidence to show notice. *Pritchett & Allen vs. Sessions*,..... 293
2. C. employed H. to take a raft of timber down the Pee Dee river, and deliver it in Georgetown to his factor. H. before reaching Georgetown, represented himself to be the owner, and sold the timber to B.; and this was an action of trover by C. against B. for the conversion:—*Held*, that if B. could show that he purchased in entire good faith, supposing H. to be the owner; that he really appeared to be the owner, and that C. by his acts enabled him so to appear, that then B. would not be liable. *Carmichael vs. Buck*,..... 332
3. In cases of agency the general rule is, that a special agent can bind his principal only to the extent of the authority conferred: nevertheless, where one deals with an agent, whether general or special, in ignorance of his private instructions, the principal is bound if the act of the agent be within the scope of the authority which the principal holds him out to the world to possess,..... *Id.*
4. Where an agent in possession of goods for a special purpose but without authority to sell, claims to be the owner, and sells them to a stranger, who purchases in entire good faith supposing the agent to be owner, such purchaser may pro-

tect himself against the claim of the owner, by showing that he, the owner, so acted, negligently or fraudulently, as to enable the agent to appear to the world as owner, and that he, the purchaser, was really deceived by such appearances.. *Ib.*

Vide Contracts, 3. Corporations, 2, 4. Fraud, 2.

PRISON BOUNDS' ACTS

Vide Insolvent Debtors' and Prison Bounds' Acts.

PRIVATE PATH.

Vide Pleading, 3, 4.

PURCHASER.

1. The general rule of the common law is, that an innocent purchaser of personal property from one having no title, acquires no right as against the rightful owner, except in case of a purchase in market *overt*, and there is no such thing as market *overt* in this State. *Carmichael vs. Buck*,..... 332

Vide Contracts, 3, 6. Fixtures. Fraud, 2. Principal and Agent, 2, 4. Sheriff, 1. Sheriff's Deed, 1.

QUO WARRANTO.

Vide City Council of Charleston, 2.

RAILROADS.

1. The rule in *Danner's* case, (4 Rich. 329,) that a *prima facie* case of negligence is made out against a railroad company, where it is shown that *cattle*, pasturing on uninclosed lands, are killed by the train of the company, does not apply where the animal killed is a dog. *Wilson vs. Railroad Company*,. ... 52
2. By the law of this State, cattle should be fenced out, and not fenced in. The entry, therefore, of cattle or a horse, upon an uninclosed Railroad track, is no trespass. *Murray vs. Railroad Company*,..... 227

3. An owner who permits his horse to roam at large over uninclosed land, is not guilty of such negligence as will embarrass his recovery, should the horse be killed by the negligence of another, *Ib.*
 4. The rule in *Danner's* case, that mere proof that cattle were killed upon a Railroad track by the train of the Company, is sufficient to throw the *onus*, of showing that there was no negligence, on the Company, *held*, applicable to a case of the killing of a horse at night, *Ib.*
 5. Where the Company are charged with the negligent killing of a horse upon the track of the road, the absence at the trial of the agents, or servants, of the Company, who were on the train when the horse was killed, raises a strong presumption against the Company, *Ib.*
 6. It is the duty of a Railroad Company not to obstruct public roads, where they cross the Railroad track, either by stopping a train across the public road, or otherwise; and the Company must take the consequences of all such obstructions, *Ib.*
 7. It is the duty of the Company to slacken speed at a turn out, and to give warning when approaching a crossing; and it must not appear that such duties were disregarded when they attempt to show want of negligence, *Ib.*
 8. A subscription to a Railroad Company, *held* valid, though made to one who was not a commissioner to receive subscriptions, but who, taking an interest in the Road, went about soliciting subscriptions in order to secure the charter. *Railroad Company vs. Rodrigues*, 278
 9. Where the charter of a Railroad Company declares, that the share of a defaulting stockholder, "shall be liable to forfeiture, and the Company may declare the same forfeited and vested in the Company," the option to forfeit is with the Company, and not with the stockholders, *Ib.*
 10. A stockholder is bound by his subscription to a Railroad Company, though he subscribed under the mistaken belief that he might forfeit his stock at his pleasure; and it makes no difference that he was assured by the person taking the subscription that he had the right, under the terms of the charter, to forfeit, such assurance being founded on mistake, and not being wilfully false, *Ib.*
- Vide *City Council of Charleston. Common Carriers*, 2. *Evidence*, 4. *Statutes*, 3.

REASONABLE TIME.

Vide *Contracts*, 6.

ROAD LAW.

1. The Commissioners of Roads ordered a road, which was in part new, and in part an old road to the use of which the public were entitled by prescription, to be opened and worked upon. The only landowner who objected was R. over whose land the old road ran :—*Held*, that R. had no right to object; and that R. and C. were properly fined by the Board, each in a sum over twenty dollars, for refusing to work on the road. *Commissioners of Roads vs. Rumph*,... 303
2. Where Commissioners of the Roads order a road to be opened and worked upon, and impose a fine, even over twenty dollars, for not working on the road, their action is conclusive. The party fined cannot object to their want of jurisdiction when an action is brought to recover the fine. The objection should be made at an earlier stage of the proceeding. *Sem-ble*,..... *Ib.*

Vide *Pleading*, 3, 4:

RULES OF COURT.

Vide *Jury*. *Additional Rules of Court*, App. 549.

SEALED NOTE.

Vide *Partnership*.

SET-OFF.

4. An independent demand for unascertained damages arising *ex contractu*, *held*, to be admissible as set-off. *Haynes vs. Prothro*, 318
- Vide *Attachment, Foreign and Domestic*, 4. *Contracts*, 2, 3.

SHERIFF.

1. A purchaser of land at sheriff's sale, who had complied with

the terms of sale, but had never taken titles, devised the land for life, with remainder in fee. About twelve years after the sale, the devisee for life released to the remainderman, and gave him an order on the sheriff to make titles to him:—*Held*, That the sheriff then in office, the successor of the one who sold, could make titles under the Act of 1839, sec. 61, to the remainder-man. *Sumner vs. Palmer*, 38

2. Under *feri facias* against B., the sheriff levied on and sold as a whole, the interest of B. in the store of B. & L., co-partners, and his interest was purchased by L. On rule against the sheriff, *held*, that he was not excused from paying over the money to the *feri facias* against B., because some six months before the rule was moved for, he had been notified by one claiming to be a creditor of B. & L., not to apply the fund to the *feri facias* against B., as it would be claimed by the creditors of the firm. *Hooks vs. Byrd*,..... 120
3. Judgment creditors having the right to postpone a re-sale of land, where they do so, the sheriff is in no default, and is not liable to the defendant in execution for damages sustained by reason of the postponement. *State of South Carolina vs. Yongue*,..... 448
4. Where loss accrues by reason of a sheriff's failure to make such re-sale of land as will bind the first purchaser, the administrators of the defendant in execution have no right of action against the sheriff to recover for such loss, where it appears that the defendant in execution had before the first sale conveyed away the land, and at the re-sale the only judgment and *fi. fa.* older than the conveyance had been satisfied, *Id.*

SHERIFF'S ADVERTISEMENT.

1. In computing the time of a sheriff's advertisement, the day it commenced and the day of sale, may both be counted: *Semble. Manning vs. Dove*,..... 395

Vide *Sheriff's Deed*, 2.

SHERIFF'S DEED.

1. In an action of trespass to try title by a purchaser at sheriff's sale, against the party as whose property the land was

- sold, the defendant is estopped from showing title in a third person whose tenant he claims to be. *Sumner vs. Palmer*,..... 38
2. A sheriff's deed being an estoppel upon the party as whose property the land was sold, he cannot object to its validity, because the land was not advertised for sale for the full time required by law. *Manning vs. Dove*,..... 395
3. Where the description of the land in a sheriff's levy is in general terms he may, very properly, describe it accurately and fully in his deed,..... *Ib.*
- Vide *Sheriff*, 1.

SHERIFF'S SALE.

Vide *Frud*, 5. *Sheriff*, 8, 4.

SINGLE BILL.

Vide *Partnership*.

SLANDER.

1. To charge one with the intemperate use of spirituous liquors, is not actionable, *per se*. *O'Hanlon vs. Myers*,..... 128
2. To charge one with having burnt, destroyed and suppressed a will, is not actionable, *per se*,..... *Ib.*
3. In slander for charging plaintiff with having broken open the house of A. B., and robbing her of money, failure to give the Christian name of A. B. in the *colloquium*, though it may be good ground for special demurrer, is no ground for motion in arrest of judgment. *Galloway vs. Courtney*,.... 414
4. The words themselves clearly imputing the crime of larceny, an averment in the declaration, that the defendant intended to charge the plaintiff with larceny, is not necessary,..... *Ib.*
5. Defendant may show in mitigation of damages, that, before the words were spoken, what another had said in reference to the same offence as committed by plaintiff, had been communicated to him,..... *Ib.*

Vide *Pleading*, 1, 2.

SLAVES.

1. A deed of gift of slaves, accompanied by a secret trust, that the "slaves shall be held in nominal servitude only," though declared "void and of no effect," by the third section of the Act of 1841, (11 Stat. 155,) is nevertheless good, not only against the donor, but, also, against his administrator after his death. Such deed is void, only "for the benefit of the distributees or next of kin of the donor;" and they alone, it seems, can impeach it under the provisions of the Act. *Vose v. Hannahan*,..... 465

Vide *Taxes*, 2, 3. *Wills and Testaments*, 2, 3, 4.

STATUTES.

1. It will not be presumed from the title, which alone has been preserved, of the Act of 1682, for the suppression of drunkenness, that the Act is of force, and that offenders under it are liable to indictment and punishment. *O'Hanlon vs. Myers*,..... 128
2. The Act of 1691, (2 Stat. 68) "for the better observance of the Lord's Day, commonly called Sunday," which provides, amongst other things, for the punishment of drunkenness, is not of force,..... *Ib.*
3. Act of the Legislature declared obsolete and inoperative, from non-user,..... *Ib.*
4. The first section of the Act of 1852, directs in certain contingencies, two subscriptions, of five hundred thousand dollars each, to the Blue Ridge Railroad Company; and the fifth section directs that the whole subscription shall be paid in bonds, to be countersigned by the comptroller general, "which shall be payable in five instalments of two hundred thousand dollars each." But one subscription of five hundred thousand dollars was taken, and the two first instalments of that were paid in bonds of two hundred thousand dollars each, but the last instalment of one hundred thousand dollars, the comptroller general refused to pay, because he construed the Act to be imperative and to require each instalment to be for two hundred thousand dollars:—*Held*, that the comptroller general was wrong in his construction of the Act, and that the last instalment, though only for

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one hundred thousand dollars, should be paid. *State vs. Ashmore*,..... 248

Vide *City Council of Charleston*, 2. *Writs*.

SUM. PRO.

1. A judgment by confession on sum. pro., taken during vacation, is valid, though not entered on the journal. *Manning vs. Dove*,..... 395
2. The confession endorsed on the process, and signed by the defendant, is, it seems, a sufficient judgment, in such a case,..... *Ib.*

SURETIES.

1. On 29th January, 1855, J. P. was elected treasurer of a corporation, and on the 30th January gave bond with W. L. as surety. On the books of J. P.'s predecessor appeared a receipt of J. P.'s for two hundred and fifty-two dollars and seventy-two cents, without date:—*Held*, that this was sufficient, *prima facie*, to charge W. L. in a suit for the defalcation of J. P.; that, even if the money was received before the bond was given, W. L. was liable. *Town Council vs. Lewis*,..... 171
2. Where a fund, being in the hands of an Ordinary, under a mistaken notion as to his right to receive and hold it officially, was paid over to his successor, who threatened suit unless it was paid over:—*Held*, That the sureties of the successor, he having wasted the fund, were not liable for it. *State of South Carolina vs. White*,..... 442

SURVEY.

Vide *Trespass to try Title*, 2.

TAXES.

1. The charter of the Bank of Chester, passed in December, 1852, provides, "that no municipal corporation shall tax the capital stock, or profits of the Bank, without authority first had and obtained from the Legislature." By Act of

- December, 1853, the Town Council of Chester were authorized to impose a tax on a multitude of subjects, amongst them, "on all stocks of every kind." *Held*, that the Town Council could not impose a tax on the capital stock of the Bank of Chester. *Bank vs. Chester*,..... 104
2. By the charter of the City Council of Charleston, they may impose a tax on slaves brought from other States, into the City for sale. *State vs. Charleston*,..... 240
3. A tax on slaves brought from other States into this State for sale, is not unconstitutional,..... *Ib.*
- Vide *City Council of Charleston*, 1. *Constitutional Law*.

TIME.

- Vide *Contracts*, 6. *Criminal Law*. *Sheriff's Advertisement*.
Sheriff's Deed, 2.

TRESPASS TO TRY TITLE.

1. In trespass to try title, a verdict for the land on which the defendant lives is sufficiently definite. *Manning vs. Dove*,... 395
2. In trespass to try title, a survey is not always necessary in order to identify the land. Other evidence may be resorted to for that purpose,..... *Ib.*
3. Where in trespass to try title the defence is, that S., an entire stranger, had acquired title by adverse possession, the fact that S. had, many years before the trial, abandoned the possession, and that neither he nor any one claiming under him, had since ever claimed the land, is entitled to consideration upon the question as to the character of S.'s possession, whether it was adverse or not. *Smoke vs. Smoke*,..... 433
4. Where such a defence is set up, the extent of the claim and the limits of the possession must be shown,..... *Ib.*

Vide *Contracts*, 6.

UNDUE INFLUENCE.

Vide *Wills and Testaments*, 5.

UNDUE PREFERENCE.

Vide Insolvent Debtors' and Prison Bounds' Acts, 11, 12.

VENDOR AND VENDEE.

Vide Contracts, 6.

WARRANTY.

1. Upon a question of unsoundness, the complaints of the negro are admissible in evidence, as indications of the seat and nature of the disease. *Welch vs. Brooks & Hunt*,..... 123
2. That no physician was called in to attend the negro does not defeat the purchaser's right to recover upon the warranty of soundness,..... *Id.*

WILFUL MISCHIEF.

Vide Criminal Law, 1, 2, 3.

WILLS AND TESTAMENTS.

1. Upon a question of probate, the inquiry is, whether there be a valid will, in whole or in part; if only so much be valid as revokes prior wills and appoints executors, still it must be admitted to probate. *Jolliffe vs. Fanning & Phillips*,..... 186
2. A clause in a will, void under the first section of the Act of 1841, because it directs certain slaves of the testator to be taken beyond the limits of the State and there emancipated, does not vitiate the will upon a question of probate.. *Id.*
3. Nor is a will invalid upon a question of probate because it contains a devise and bequest for the benefit of slaves, such devise and bequest being void under the fourth section of the Act of 1841,..... *Id.*
4. Whether clauses in a will directing certain slaves to be taken to Ohio and there emancipated, and making provision for such slaves out of the other estate of the testator, are void under the Act of 1841, is a question which belongs to a

Court of construction and administration, and not to a Court of probate: *Semble*,..... *Ib.*

5. Will impeached upon certain legal grounds, and also upon grounds presenting issues of fact as to fraud, undue influence and insanity. Verdict against the will set aside, and new trial ordered, the Court holding the legal grounds insufficient, and that there was nothing in the evidence to sustain the allegations of fraud, undue influence and insanity,..... *Ib.*
6. Upon a question of probate, *held*, that an executor is a competent witness to attest a mixed will—the Court thinking that he is also competent to attest a will of personalty only. *Noble vs. Burnett*,..... 505
7. An executor takes in this State a beneficial interest under the will, and that interest is taken away by the statute 25 Geo. 2, ch. 25.,..... *Ib.*
8. The question, whether the office of executor, as well as his commissions, is taken away by the statute, not decided,..... *Ib.*

Vide Criminal Law, 3. Slander, 2.

WITNESS.

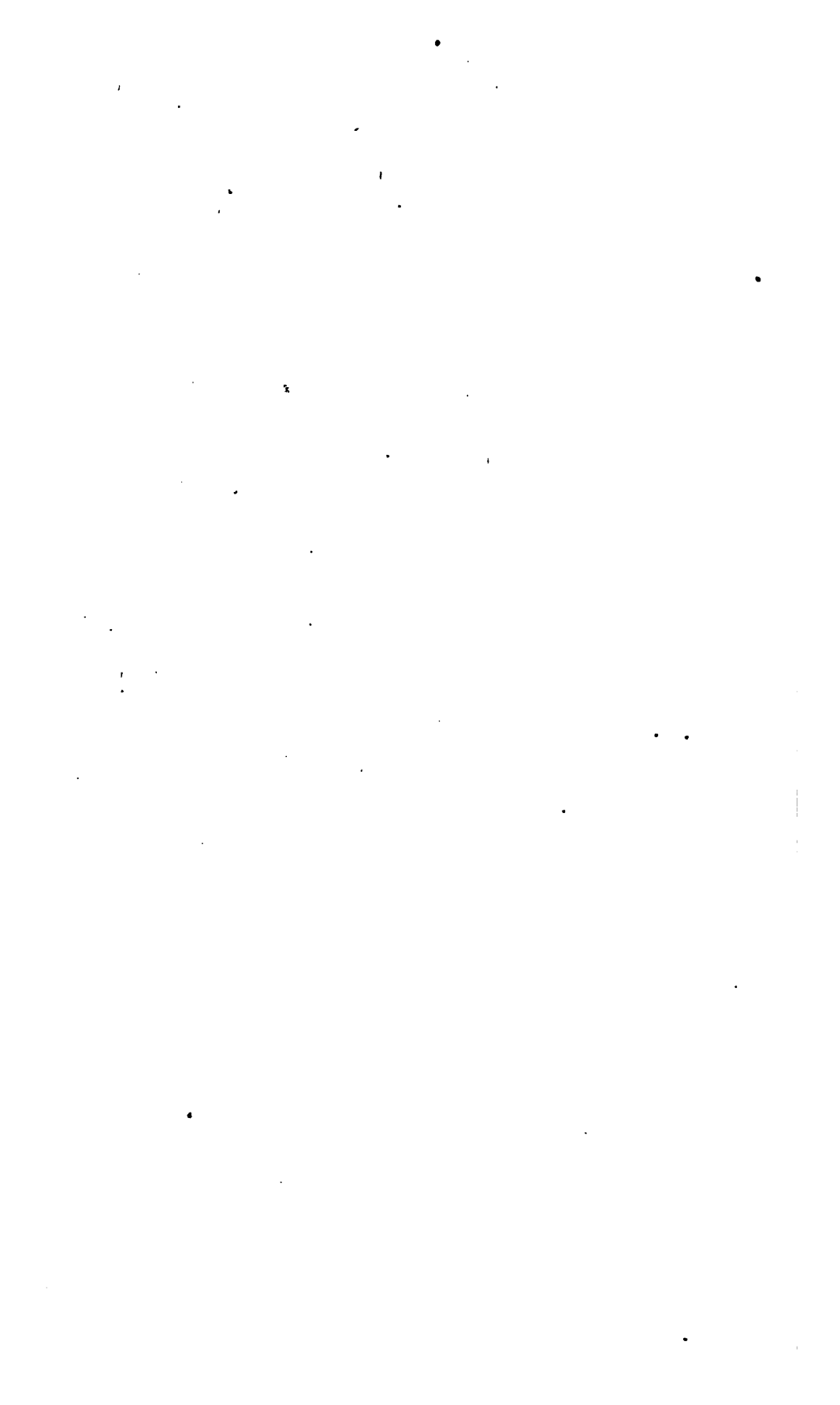
Vide Evidence, 1, 3, 6. Perjury, 6. Wills and Testaments, 6.

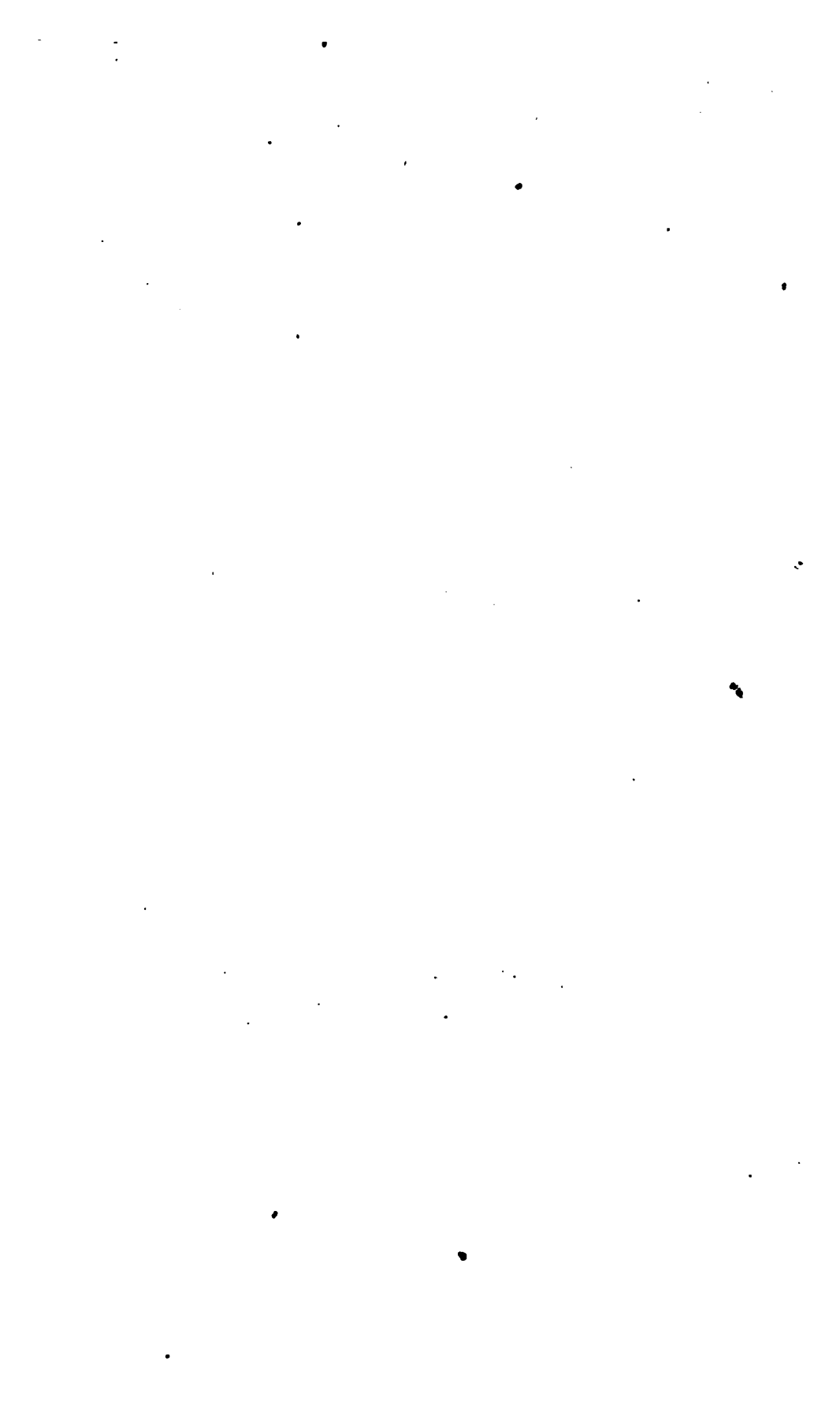
WRITS.

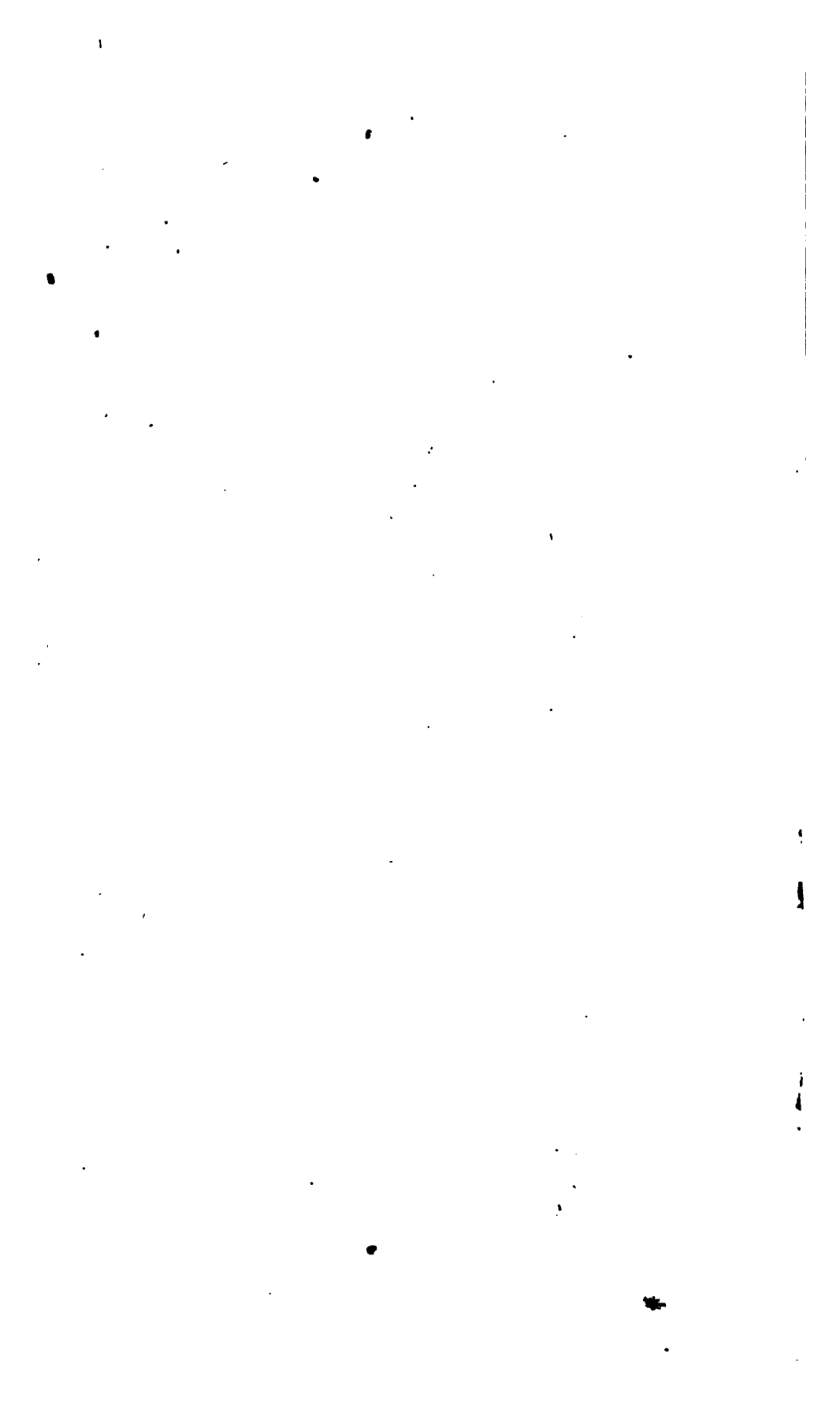
1. The sitting of the Court for Williamsburg, was altered by Act of December, 1856, from the third, to the second, Monday after the fourth Monday in March.: *Held*, that a writ returnable to the third Monday after the fourth Monday in March, and lodged and served before the passage of the Act, was valid, although the Act contained no provision making valid such writs. *Barnes, Bateman & Rudderow vs. Bell*,..... 376

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